

NORTH CAROLINA  
CUMULATIVE  
STATUTES  

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1925

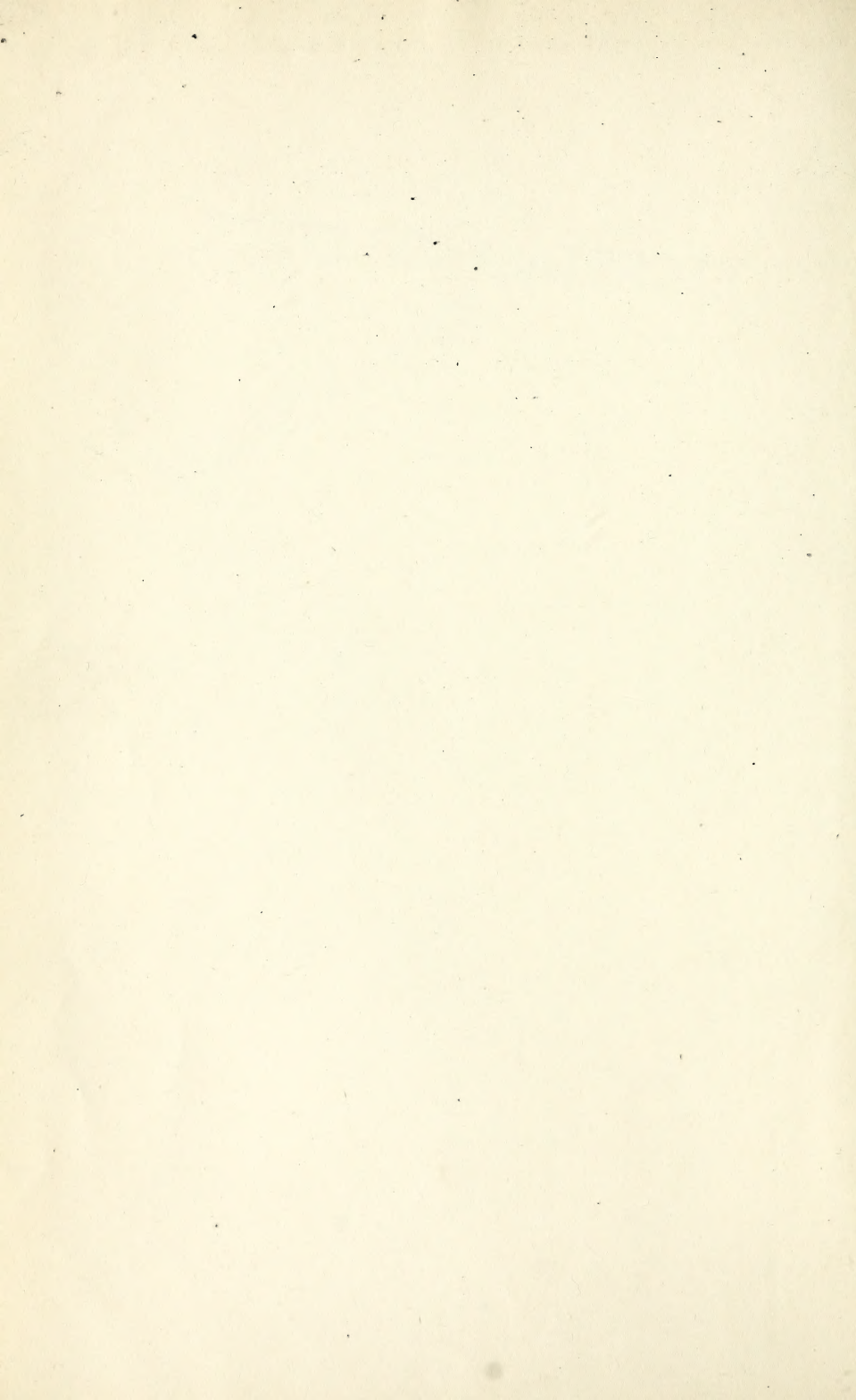


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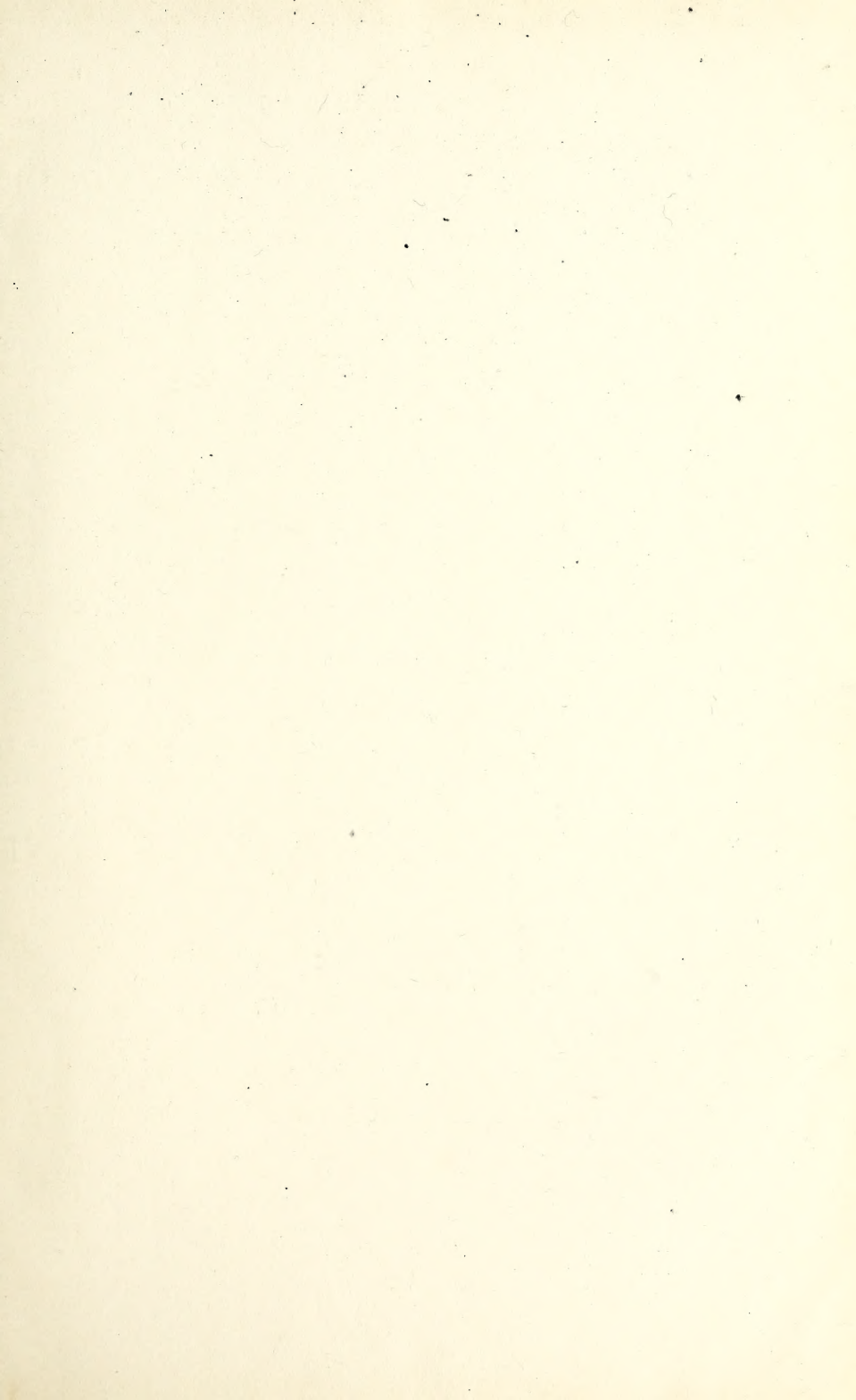


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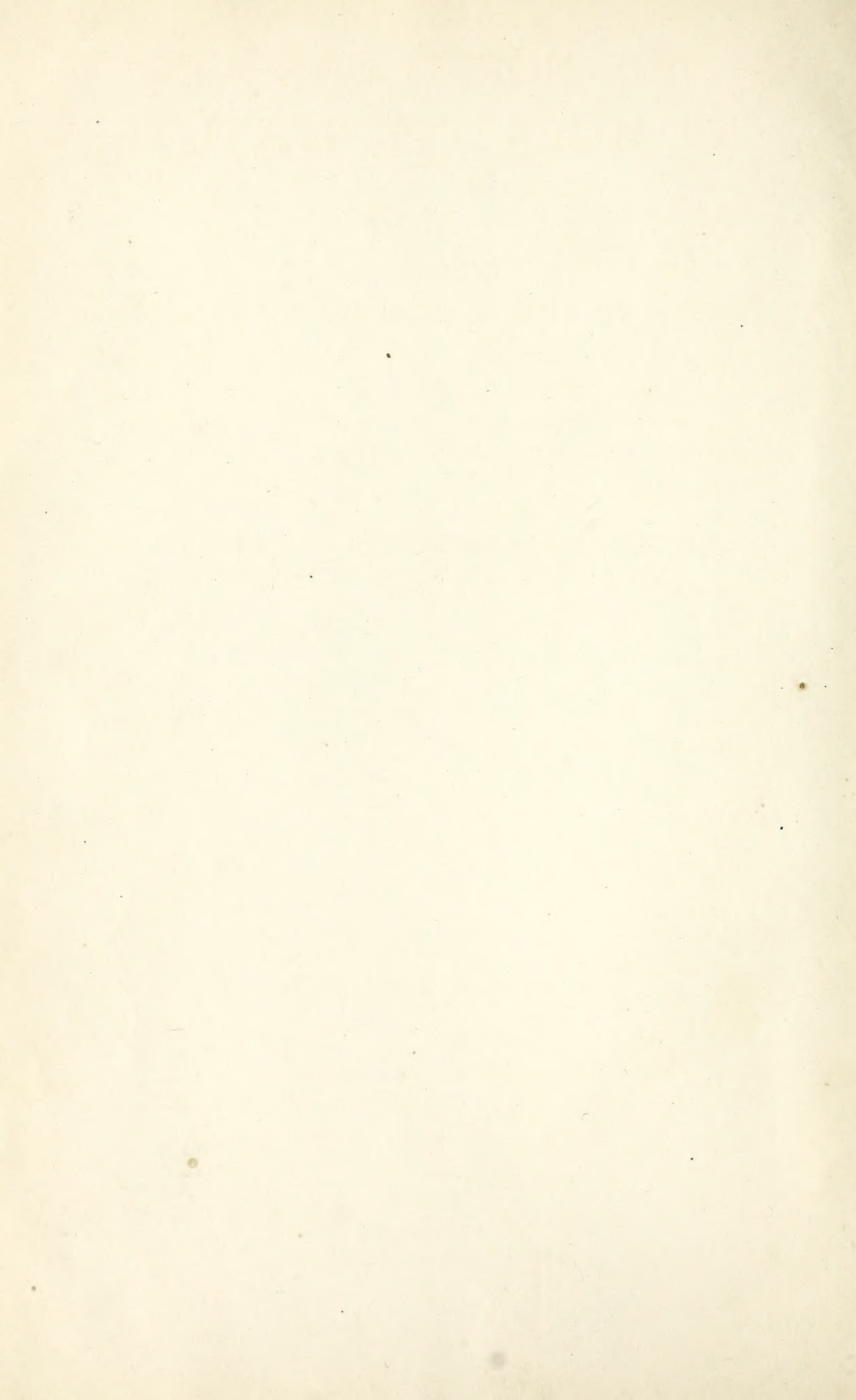




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# 1925 NORTH CAROLINA CUMULATIVE STATUTES

*and*

## Notes to the Consolidated Statutes

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CONTAINING ALL GENERAL LAWS OF 1924  
AND 1925 WITH FULL ANNOTATIONS

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Under the Editorial Supervision of  
THOMAS JOHNSON MICHIE

Assisted by  
A. HEWSON MICHIE

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1925  
THE MICHIE COMPANY  
Charlottesville, Va.



1925 NORTH CAROLINA  
CONSOLIDATED STATUTES  
AND  
NOTES TO THE CONSOLIDATED STATUTES  
CONTAINING ALL AMENDMENTS  
AND LAWS  
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## Preface

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This compilation contains all the general acts of the legislature of North Carolina enacted during the sessions of 1924 and 1925. The classification of these acts is in accordance with the prevailing system with which the North Carolina attorney is already familiar. New acts are codified under the appropriate chapters and articles. Amending acts retain the numbering of the amended sections.

Special attention is directed to the method used throughout the book of pointing out the exact effect an amendatory act may have upon a given section. All new language is inserted in brackets, and all omissions are commented upon in editors' notes to the sections. This method enables the lawyer to ascertain at a glance what was inserted or omitted, and saves laborious comparisons.

The annotations are very full and comprehensive. They begin where the consolidated Statutes stopped, and continue to the date of publication.





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Ch. 165		§ 1443	Ch. 190,	§ 4	§ 3924(l)
Ch. 166		§ 3857(d)	Ch. 190,	§ 5	§ 3924(m)
Ch. 167,	§ 1	§ 1608(ccc)	Ch. 190,	§ 6	§ 3924(n)
Ch. 167,	§ 2	§ 1608(ddd)	Ch. 190,	§ 7	§ 3924(o)
Ch. 167,	§ 3	§ 1608(eee)	Ch. 190,	§ 8	§ 3924(p)
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Ch. 167,	§ 7	§ 1608(iii)	Ch. 190,	§ 12	§ 3924(t)
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Ch. 167,	§ 11	§ 1608(mmm)	Ch. 190,	§ 16	§ 3924(x)
Ch. 167,	§ 12	§ 1608(nnn)	Ch. 190,	§ 18	§ 3924(z)
Ch. 167,	§ 13	§ 1608(ooo)	Ch. 190,	§ 19	§ 3924(aa)
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Ch. 190, § 24	§ 3924(ff)	Ch. 216, § 4	§ 1435(g)
Ch. 190, § 25	§ 3924(gg)	Ch. 216, § 5	§ 1435(h)
Ch. 191, § 1	§ 7251(z)	Ch. 216, § 6	§ 1435(i)
Ch. 191, § 2, 3	§ 7251(cc)	Ch. 216, § 7	§ 1435(j)
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Ch. 192, § 5	§ 7472(q) 4	Ch. 217, § 2	§ 7194
Ch. 192, § 6	§ 7472(q) 5	Ch. 220	§ 5394(b)
Ch. 192, § 7	§ 7472(q) 6	Ch. 221	§ 5468
Ch. 192, § 8	§ 7472(q) 7	Ch. 222, § 1	§ 593(a)
Ch. 192, § 9	§ 7472(q) 8	Ch. 223, § 1	§ 5207(a)
Ch. 192, § 10	§ 7472(q) 9	Ch. 223, § 1	§ 5207(k)
Ch. 192, § 11	§ 7472(q) 10	Ch. 223, § 2	§ 5207(b)
Ch. 192, § 12	§ 7472(q) 11	Ch. 223, § 3	§ 5207(c)
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Ch. 193, § 1	§ 2141(a)	Ch. 223, § 5	§ 5207(e)
Ch. 193, § 2	§ 2141(b)	Ch. 223, § 6	§ 5207(f)
Ch. 194	§ 2125	Ch. 223, § 7	§ 5207(g)
Ch. 195, § 2	§ 2969(u)	Ch. 223, § 8	§ 5207(h)
Ch. 196	§ 2354	Ch. 223, § 9	§ 5207(i)
Ch. 197	§ 6054	Ch. 223, § 10	§ 5207(j)
Ch. 198, § 1	§ 5825(j)	Ch. 223, § 12	§ 5207(l)
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Ch. 203, § 5	§ 5409(e)	Ch. 226	§ 5761
Ch. 203, § 6	§ 5409(f)	Ch. 227	§ 3884
Ch. 203, § 7	§ 5409(g)	Ch. 228, § 1	§ 7766(b)
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Ch. 204, § 1	§ 5969	Ch. 228, § 4	§ 7766(e)
Ch. 205	§ 5336(a)	Ch. 228, § 5	§ 7766(f)
Ch. 206	§ 975	Ch. 228, § 6	§ 7766(g)
Ch. 207, § 1	§ 7695(a)	Ch. 228, § 7	§ 7766(h)
Ch. 207, § 2	§ 7695(b)	Ch. 228, § 8	§ 7766(i)
Ch. 207, § 3	§ 7640	Ch. 229	§ 1297
Ch. 208	§ 2085	Ch. 230, § 2	§ 7486(kk)
Ch. 210, § 1	§ 7685(a)	Ch. 230, § 3	§ 7486(ll)
Ch. 210, § 2	§ 7685(b)	Ch. 230, § 4	§ 7486(mm)
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Ch. 212	§ 2105(bb)	Ch. 231, § 1	§ 2613(r)
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Ch. 237	§ 1443	Ch. 266, § 5	§ 7516(h)
Ch. 239, § 1	§ 4399(a)	Ch. 266, § 6	§ 7516(i)
Ch. 239, § 2	§ 4399(b)	Ch. 266, § 7	§ 7516(j)
Ch. 239, § 3	§ 4399(c)	Ch. 266, § 8	§ 7516(k)
Ch. 239, § 4	§ 4399(d)	Ch. 266, § 9	§ 7516(l)
Ch. 239, § 5	§ 4399(e)	Ch. 267	§ 69
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Ch. 241	§ 1443	Ch. 270, § 1	§ 5842(d)
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Ch. 242, § 2	§ 1608(t)	Ch. 270, § 3	§ 5842(f)
Ch. 244, § 1	§ 1461(a)	Ch. 270, § 4	§ 5842(g)
Ch. 244, § 2	§ 1461(b)	Ch. 270, § 5	§ 5842(h)
Ch. 244, § 3	§ 1461(c)	Ch. 270, § 6	§ 5842(i)
Ch. 244, § 4	§ 1461(d)	Ch. 270, § 7	§ 5842(j)
Ch. 244, § 5	§ 1461(e)	Ch. 270, § 8	§ 5842(k)
Ch. 246, § 1	§ 7675(a)	Ch. 270, § 9	§ 5842(l)
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Ch. 246, § 3	§ 7675(c)	Ch. 270, § 11	§ 5842(n)
Ch. 247, § 1	§ 7308(a)	Ch. 270, § 12	§ 5842(o)
Ch. 248	§ 3366(j) 1	Ch. 272	§ 2618
Ch. 249	§ 7675(d)	Ch. 275, § 6	§ 3908
Ch. 250, § 1	§ 1608(i)	Ch. 275, § 6	§ 4554
Ch. 250, § 2	§ 1608(t)	Ch. 275, § 6	§ 4665
Ch. 250, § 3	§ 1608(y)	Ch. 275, § 6	§ 4895(t)
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Ch. 257	§ 1132	Ch. 275, § 6	§ 7043
Ch. 258, § 1, 2	§ 7979(c)	Ch. 275, § 6	§ 7735
Ch. 258, § 1, 2	§ 7979(d)	Ch. 275, § 7	§ 7486(o)
Ch. 259	§ 7472(q) 5	Ch. 275, § 9	§ 7683(a)
Ch. 260	§ 3846(v)	Ch. 276, § 1	§ 6683(a)
Ch. 261, § 1	§ 7024(a)	Ch. 276, § 2	§ 6683(b)
Ch. 261, § 2	§ 7024(b)	Ch. 276, § 3	§ 6683(c)
Ch. 261, § 3	§ 7024(c)	Ch. 276, § 4	§ 6683(d)
Ch. 261, § 4	§ 7024(d)	Ch. 276, § 5	§ 6683(e)
Ch. 261, § 5	§ 7024(e)	Ch. 276, § 6	§ 6683(f)
Ch. 261, § 6	§ 7024(f)	Ch. 276, § 7	§ 6683(g)
Ch. 261, § 7	§ 7024(g)	Ch. 276, § 8	§ 6683(h)
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# Constitution of the State of North Carolina

## PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof, and for the better government of this State, ordain and establish this Constitution.

### General Note.

**The purpose** of the Constitution, as applied to the subordinate divisions of the State Government, is not to weaken or destroy the power of the Legislature in its necessary control over them, but to preserve their cohesion and prevent their dismemberment. *Coble v. Commissioners*, 184 N. C. 342, 114 S. E. 487.

**A constitution must be construed on broad and liberal lines** to give effect to the intention of the people who have adopted it, and must be considered as a whole and construed to allow significance to each and every part, if this can be done by fair and reasonable intendment. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612.

**The rules for the interpretation of statutes also apply to constitutional provisions**, and therein the intent and purposes should be considered with regard to the object to be accomplished and the wrong to be prohibited or redressed; and to determine whether the terms of a statute are unconstitutional, every presumption is in favor of the validity of the statute, and of the honesty of purpose of the Legislature to conform to the organic law with its restrictions and limitations; and the courts will sustain the constitutionality of the statute unless its invalidity, thus ascertained, is "clear, complete, and unmistakable," or the nullity of the act is beyond question. *Coble v. Commissioners*, 184 N. C. 342, 114 S. E. 487.

## ARTICLE I

### DECLARATION OF RIGHTS

That the great, general and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and Government of the United States, and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare:

**SECTION 1.** *The equality and rights of men.* That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

**SEC. 2.** *Political power and government.* That all political power is vested in, and derived from, the people; all government



of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

SEC. 3. *Internal government of the State.* That the people of this State have the inherent, sole and exclusive right of regulating the internal government and policies thereof, and of altering and abolishing their Constitution and form of government whenever it may be necessary for their safety and happiness; but every such right should be exercised in pursuance of the law, and consistently with the Constitution of the United States.

SEC. 4. *That there is no right to secede.* That this State shall ever remain a member of the American Union; that the people thereof are part of the American nation; that there is no right on the part of the State to secede, and that all attempts, from whatever source or upon whatever pretext, to dissolve said Union, or to sever said nation, ought to be resisted with the whole power of the State.

SEC. 5. *Of allegiance to the United States Government.* That every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of the State in contravention or subversion thereof can have any binding force.

SEC. 6. *Public debt; bonds issued under ordinance of Convention of 1868-, '68-'69, '69-'70, declared invalid; exception.* The State shall never assume or pay, or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; nor shall the General Assembly assume or pay, or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred, or issued, by authority of the Convention of the year one thousand eight hundred and sixty-eight, nor any debt or bond incurred or issued by the Legislature of the year one thousand eight hundred and sixty-eight, either at its special session of the year one thousand eight hundred and sixty-eight or at its regular sessions of the years one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, and one thousand eight hundred and sixty-nine and one thousand eight hundred and seventy, except the bonds issued to fund the interest on the old debt of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the State, at a regular election held for that purpose.

SEC. 7. *Exclusive emoluments, etc.* No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

**Sale of Bonds at Less Than Par.**—It is not objectionable, or in contravention of our State Constitution as discriminatory, for the Legislature, owing to unusual or compelling local conditions, to permit municipi-

palities within the limits of a certain county to sell their bonds for less than par when the same privilege is not granted in other counties. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187.

A special enactment applying to the municipal or governmental agencies within a county allowing them to sell their bonds at less than par, in an emergency, is not in conflict with this section, as allowing special privileges under a general statute requiring such corporations not to sell their bonds at less than par. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187.

SEC. 8. *The legislative, executive, and judicial powers distinct.* The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other.

See notes to Art. IV, § 18 of this supplement.

**Authority to Levy Taxes.**—The State Constitution vests exclusive authority in the Legislature to levy taxes, Art. V, sec. 3, which may not be interfered with by the courts, a coördinate part of the Government, when it is exercised within the constitutional restrictions. *Person v. Board*, 184 N. C. 499, 115 S. E. 336.

**The rules prescribed by the Supreme Court** to regulate its own procedure, including the rule as to dismissing an appeal thereto if not docketed, or a recordari prayed for in apt time, will be strictly enforced. Being under the exclusive authority therein given to the Supreme Court by this section of the Constitution, as distinguished from procedure applying to courts inferior thereto, Art. IV, sec. 2, a statute in conflict therewith will not be observed. *State v. Ward*, 184 N. C. 618, 113 S. E. 775. Art. I, § 11.

See note of *State v. Godette*, 188 N. C. 497, 125 S. E. 24, under Const. Art. I, § 15 of this supplement.

**Right to "Confront," Accuser and Witnesses.**—The right of the accused in a criminal action to confront the accuser and witnesses extends to his having them present before the jury at the trial, and, under oath, have them testify to matters within their own knowledge, subject to the test of a competent cross-examination. *State v. Dixon*, 185 N. C. 727, 117 S. E. 170.

Where the defendant is tried for forgery and fraudulently uttering and publishing forged checks, deposited by him with a forwarding bank for collection, the proper officer of the forwarding bank is competent to testify that the checks had accordingly been forwarded to the payer bank, and had been protested for nonpayment and returned, and in corroboration offer the checks in evidence with the notary's certificate of protest; but the proper officer of the payer bank is only competent to testify that the maker of the check had no account there, under the constitutional guarantee that the accused in all criminal actions shall have the right to confront the accuser and witnesses, etc. *State v. Dixon*, 185 N. C. 727, 117 S. E. 170.

**Instruction Referring to Excluded Evidence.**—In an action involving the crime of murder in the first degree, an instruction that refers to a pregnant circumstance to show the previous malice and subsequent premeditation of the prisoner to commit the act, as a fact sworn to but which had been excluded from the evidence, is reversible error in denying to the prisoner his constitutional right to confront the witnesses against him, and to submit them to his cross-examination. *State v. Love*, 187 N. C. 32, 121 S. E. 20.

**Rule of Evidence upon Second Trial.**—The common-law rule of evidence, allowing, upon the second trial of a criminal action, testimony of a witness of the evidence given by a witness on the preliminary trial, under the conditions specified, does not deprive the defendant of his constitutional right to confront his accuser and his witnesses, as provided in



this section, this right having already been accorded him on the preliminary hearing. *State v. Maynard*, 184 N. C. 653, 113 S. E. 682.

**Where Defendant Witness in Own Behalf.**—It is not in contravention of the provisions of our Constitution for the State to require a defendant on trial for carrying a concealed weapon to testify whether he had it in a holster on the occasion concealed under his arm when the defendant had taken the stand to testify in his own behalf, the law as to self-incriminatory evidence not applying under the circumstances. *State v. Spencer*, 185 N. C. 765, 117 S. E. 803.

**Verdict Not Responsive to Issues.**—Counts in an indictment charging the defendant with violating our prohibition law, first, having liquor in his possession for the purpose of sale; second, with receiving within the State a quantity greater than one quart; third, receiving within the State a package of spirituous liquor in a quantity greater than one quart, do not charge the offense prohibited by C. S., 3386, making it unlawful for any person during the space of fifteen consecutive days to receive such liquors in a quantity or quantities totaling more than one quart; and a verdict under the counts in this indictment of guilty of receiving more than one quart of whiskey in fifteen days is not responsive to the issues, and is a conviction of an offense of which the defendant was not tried, and concerning which a former conviction may not be successfully maintained, and is in contravention of this section and section 12, of our State Constitution. *State v. Snipes*, 185 N. C. 743, 117 S. E. 500.

SEC. 9. *Of the power of suspending laws.* All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights and ought not to be exercised.

SEC. 10. *Elections free.* All elections ought to be free.

SEC. 11. *In criminal prosecutions.* In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

SEC. 12. *Answers to criminal charges.* No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment, or impeachment.

See notes to Art. I, § 11.

SEC. 13. *Right of jury.* No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal.

**Appeal from Courts of Subordinate Jurisdiction.**—The right to a trial by jury in a criminal action is preserved to the accused by the statutory requirement of a trial de novo in the Superior Court on appeal from a court of subordinate jurisdiction, and conviction in the Superior Court cannot be had unless upon the verdict of the jury, in accordance with the provisions of this section of our Constitution. *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394.

**Same—Court of Justice of Peace.**—An appeal from a court of a justice of the peace by the defendant in a criminal action, carries with it the constitutional right to a trial by jury in the Superior Court, where the trial is de novo, and the latter court may not affirm that part of the justice's judgment taxing the defendant with cost, over his objection, without con-

viction before the jury upon the merits of the case. *State v. Pasley*, 180 N. C. 695, 104 S. E. 533.

**Conviction upon Agreed Facts without Jury.**—In order for a conviction of a criminal offense, including misdemeanors, it is required by this section of our State Constitution that the final sentence be upon a "unanimous verdict of a jury of good and lawful men in open court," etc., and the accused cannot be lawfully convicted otherwise, though he has agreed with the solicitor upon the facts in the case, under a plea of not guilty, and the judge has found him guilty upon the agreed facts, as a matter of law, and imposed a sentence. *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394.

In *Woodland & Co. v. Southgate Packing Co.*, 186 N. C. 116, 118 S. E. 898, the court said: "The judgment appealed from is against T. S. Southgate and not against G. D. Potter, who admitted his individual liability. The jury returned no verdict in the case. There was no agreement that the judge should hear the evidence and find the facts, and the defendants have not waived their right to a jury trial. Hence we think the cause must be remanded for another hearing."

**SEC. 14. Excessive bail.** Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

**Bail After Conviction.**—This section does not give a right to bail after conviction. *State v. Bradsher*, 189 N. C. 401, 127 S. E. 349.

**Four Months for Carrying Concealed Weapon.**—The statute against carrying a concealed weapon is for peace and the preservation of human life and limb, the punishment for its violation being in the discretion of the trial judge imposing the sentence of a fine, not less than \$50 nor more than \$200, or imprisonment not less than thirty days nor more than two years; and a sentence to imprisonment for four months, under the facts of this case, is held not to be "excessive" or cruel or unusual within the inhibition of this section of the Constitution. *State v. Mangum*, 187 N. C. 477, 121 S. E. 765.

**Obstructing Highway—Injury to Property.**—A sentence of two years for each of the offenses of obstructing a highway, and wantonly injuring personal property is not in violation of this section. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248.

**Violation of Prohibition Law.**—The duration of the sentence for a misdemeanor is within the sound discretion of the trial judge when no limitation is fixed by law; and a sentence of two years imprisonment for violating the prohibition law is not objectionable as a cruel and unusual punishment, prohibited by the Constitution. *State v. Spencer*, 185 N. C. 765, 117 S. E. 803.

A sentence of two years for violating the Turlington Act will not be held as inhibited by our State Constitution as cruel and unusual, by reason of the fact that the judge after the trial and before sentence, made inquiry into the character of the defendant, the sentence imposed being in conformity with the provisions of the statute. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258.

**A sentence to 30 years and hard labor** upon conviction of the felony described in § 4209, is not cruel or unusual punishment within this section. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417.

**SEC. 15. General warrants.** General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty, and ought not to be granted.

**Seizure of Liquor Constitutional.**—The provisions of the Turlington



Act, Public Laws of 1923, permitting the seizure of intoxicating liquor being unlawfully transported and of the conveyance in which it is being done, when the officer sees or has absolute knowledge that there is intoxicating liquor in such vehicle, do not contravene the provisions of the State Constitution, Art. 1, secs. 11 and this section. *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

**SEC. 16. *Imprisonment for debt.*** There shall be no imprisonment for debt in this State, except in cases of fraud.

**Section 4480 Unconstitutional.**—Under the provision of our Constitution, this section, inhibiting “imprisonment for debt except in cases of fraud,” C. S., 4480, making it a misdemeanor for a tenant to willfully abandon his crop without paying for advances made to him by his landlord, and not requiring allegation or evidence of fraud, is unconstitutional, and the further provisions of the statute creating a civil liability for the one hiring such tenant with knowledge of the circumstances, being connected with and dependent upon the former, both in express terms and substance, is likewise unconstitutional. *Minton v. Early*, 183 N. C. 199, 111 S. E. 347. See note of this case under § 4480.

**The misdemeanor prescribed by C. S., 4284,** for one who obtains lodging, goods, accommodations from an inn, boarding or lodging place, expressly applies, by the expression of the statute, when the contract therefor has been made with a fraudulent intent, and this intent also exists in his surreptitiously absconding and removing his baggage without having paid his bill, and this statute is not inhibited by this section of the State Constitution, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. *State v. Barbee*, 187 N. C. 703, 122 S. E. 753.

**SEC. 17. *No person taken, etc., but by law of land.*** No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land.

**Section 7772 Constitutional.**—The provisions of C. S., 7772, imposing, among others, an inheritance tax upon nonresident distributees under the will of a nonresident testator or upon his distributees under the canons of descent, who are non-residents, in a corporation domesticated and operating with two-thirds of its property here, under our Statute, are not in conflict with Article 1, this section of the State Constitution or of the Fourteenth Amendment to the Constitution of the United States. *Rhode Island Hospital Trust Co. v. Doughton*, 187 N. C. 263, 121 S. E. 741.

**The taking of private lands** may be authorized by statute under the provisions of our Constitution, when for a public use or interest only, though full compensation may be provided for the owner. *Bradshaw v. Hilton Lumber Co.*, 179 N. C. 501, 103 S. E. 69.

**Appropriation “According to the Law of the Land.”**—In *Bradshaw v. Hilton Lumber Co.*, 179 N. C. 501, 103 S. E. 69, the Court said:—“And the property of one individual cannot be taken for appropriation to the use of another, even for full compensation. If such a thing were done, it would be nothing but the exercise of arbitrary and despotic power and not according to the law of the land, as these words are employed in our Constitution.”

**Impairment of Statutory Rights by Amendment.**—A statutory amendment to a former statute, which destroys and sensibly impairs vested property rights acquired under the former statute, or which attempts to transfer them either to the public, or other, except under the principles of eminent domain, and upon compensation duly made, is unconstitutional and invalid. *Watts v. Lenoir, Turnpike Co.*, 181 N. C. 129, 106 S. E. 497.

Where a turnpike corporation has acquired certain rights under stat-

ute authorizing a lease of a public road from a county, and has expended thereunder for improvements thereon large sums of money, a subsequent amendatory act which, by restricting the placing of a toll gate at a certain place, deprives the company of its right to collect a substantial part of its revenue from the road, impairs and destroys a vested property right, and is unconstitutional and invalid. *Watts v. Lenoir, etc., Turnpike Co.*, 181 N. C. 129, 106 S. E. 497.

**Cost of Street Improvements.**—It is not necessarily required by the "due process" clauses of the constitutions (Federal Constitution, Art. XIV. sec. 1, State Constitution, this section) that the total cost of street improvements allowed by statute to be made by a city or town should be referred to a regularly constituted judicial tribunal, and a statutory provision making the determination thereof by the board of aldermen of the town final and conclusive, subject to impeachment only for fraud and collusion, upon due notice previously given the private owners of the land assessed, with the right of appeal, is a valid and constitutional grant of such authority. Semble, the right of appeal is not always essential to the "due process" clauses of the State or Federal constitutions. *Gunter v. Sanford*, 186 N. C. 452, 120 S. E. 41.

**Same—Sufficient Notice.**—Where the statute authorizes the board of aldermen of a town to assess the adjoining lands on a street improved, and provides that due notice be given such owners to appear before the board and urge their objections to the proposed assessment, with right of appeal to the Superior Court, and thence to the Supreme Court, is sufficient notice to such landowners under the "due process" clauses of the State and Federal constitutions. *Gunter v. Sanford*, 186 N. C. 452, 120 S. E. 41.

**Transfer of Right of Eminent Domain.**—Where the constitutional power is given by valid statute to a logging or railroad company to exercise the right of eminent domain, and the corporation has condemned a part of its right of way with the intent to complete it and put it to a public use, it may not transfer this right to a purchasing corporation to which no statutory power was given, and enable the latter to hold and exercise it exclusively for its own private gain or benefit. *Bradshaw v. Hilton Lumber Co.*, 179 N. C. 501, 103 S. E. 69.

**Right of City to Maintain Own Water Plant.**—Where a city has entered into a contract authorized by statute to contract with a water company for its water supply, etc., the city may, after the expiration of this contract, in pursuance of authority conferred by statute erect and maintain its own water plant for this purpose, without impairing any vested right of the water company, under Art. 1, sec. 10 of the Federal Constitution, or under the Fourteenth Amendment thereof known as the due process clause, or under this section of the State Constitution prohibiting the taking of private property for a public use except by the law of the land. The question of whether during the life of the contract with a water company, the city could so act under a statute authorizing it, and the question of monopolies, discussed by Clarkson, J. *Elizabeth City Water etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611.

**Right of Contingent Remainderman in Lands Sold for Debt.**—A contingent remainderman in lands acquires his interest therein subject to the payment of testator's debts, and in that respect can acquire no vested interest therein, and a sale thereof in good faith and at a fair price by the executrix, for the payment of decedent's debts, as authorized by statute, when by proper proceedings the land could have been sold for the purposes, though the executrix has mistaken therein the authority given her under the will, cannot be held as contrary to the Federal Constitution, Art. 1, sec. 10, prohibiting the enactment by any State of a law impairing the obligation of a contract; or to the Fourteenth Amendment of the Federal Constitution, sec. 1, as to depriving a citizen of his property without due process of law; or contrary to the



provisions of our State Constitution, Art. 1, this section prohibiting that a person be disseized of his freehold, etc., except by the law of the land. *Charlotte Consolidated Const. Co. v. Brockenbrough*, 187 N. C. 65, 121 S. E. 7.

**Time to Prepare Defense.**—The question as to whether the defendant in a criminal action has sufficient time to prepare his defense before trial, and has thereby been deprived of his rights under the provisions of this section of our State Constitution, is one addressed to the sound discretion of the trial judge, which will not be reviewed on appeal when it is not made to appear that this discretionary power has been abused by him. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57.

**Right to Cross-Examine.**—The right of the defendant in a criminal action to cross-examine expert witnesses who have testified their opinion against him is a material one, guaranteed by our Constitution, this section, and a denial thereof may not be held as merely a technicality and harmless; nor is this error cured by the fact that he has had an opportunity to cross-examine one of these witnesses in refutation of the correctness of the facts upon which his conclusion was based, especially when the other witness is to be regarded as the most important one. *State v. Highway*, 187 N. C. 300, 121 S. E. 616.

**Suspended Sentence.**—Where accused was given a suspended sentence of work on roads for drunkenness, a provision that, if he became drunk again, the clerk of the court and the sheriff on information should put the sentence into execution was void, as a denial of due process of law, since the clerk and the sheriff had no judicial authority. *State v. Phillips*, 185 N. C. 614, 115 S. E. 893.

SEC. 18. *Persons restrained of liberty.* Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed.

SEC. 19. *Controversies at law respecting property.* In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.

**In General.**—This section guaranteeing the right of trial by jury in "controversies at law respecting property," includes equitable and legal elements involved in the determination of the issues made by the pleadings, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute. *Board v. George*, 182 N. C. 414, 109 S. E. 77.

**The rules of law as to the burden of proof** between the parties to litigation respecting damages to property resulting from negligence is one of substantial right guaranteed by the Federal Constitution, and more emphatically by this section. *McDowell v. Norfolk Southern R. Co.*, 186 N. C. 571, 120 S. E. 205.

**C. S., 5488**, prescribing the procedure in the event of disagreement between the county board of education and the county board of commissioners, as to the amount to be provided by the county for the maintenance of a six months school term, requiring the judge to hear the same and conclusively find the facts as to the amount needed, confers upon the courts duties of a judicial nature, not requiring a trial by jury to determine the disputed matter upon an issue of fact, and the provisions of section 5488 are not void as being repugnant to this section of the State Constitution. *Board v. Board*, 174 N. C. 469, 93 S. E. 1001, cited and applied *Board v. Board*, 182 N. C. 571, 109 S. E. 630.

**Inquiry as to Sanity.** — The constitutional provision preserving the right to a trial by jury, this section, applies only to cases in which the prerogative existed at common law or by statute at the time the Consti-

tution was adopted, and C. S., 2287, requiring that only six freeholders shall be summoned to inquire into the sanity of the person alleged to be insane, is constitutional, not requiring a jury of twelve. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568.

**Right to Poll Jury.**—Under this section a party has a right to have the jury polled, and a refusal to allow a motion to that effect is ground for setting aside the verdict. *Culbreth v. Borden Mfg. Co.*, 189 N. C. 208, 126 S. E. 419.

**Applicability to Public Officials.**—In *McInnish v. Board*, 187 N. C. 494, 122 S. E. 182, the Court said:—"In *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568, it was held that the right to a trial by jury as provided in this section applies only to cases in which the prerogative existed at common law or was procured by the statute at the time the Constitution was adopted, and not to those in which the right and the remedy are thereafter created by statute. The section cannot be invoked to deprive a public official of the discretion with which he is clothed by legislative enactment."

**Same—Removal of Prosecuting Attorney.**—The proceedings before the judge to remove a prosecuting attorney from office do not require an issue to be submitted to the jury. Upon the defendant's own admissions in this case, and evidence, he is guilty of the offense charged, which is sufficient to remove him from office; such office is not a property right under the provisions of this section. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174.

**Selection of Site for School.**—The right to trial by jury upon an issue involving the exercise by a county board of education in its selection of a site for a public-school building therein, conferred by Public Laws 1923, ch. 136, is not given by this section of the State Constitution. *McInnish v. Board*, 187 N. C. 494, 122 S. E. 182.

**SEC. 20. Freedom of the press.** The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same.

**SEC. 21. Habeas corpus.** The privileges of the writ of habeas corpus shall not be suspended.

**SEC. 22. Property qualification.** As political rights and privileges are not dependent upon, or modified by, property, therefore no property qualification ought to affect the right to vote or hold office.

**SEC. 23. Representation and taxation.** The people of the State ought not to be taxed or made subject to the payment of any impost or duty, without the consent of themselves, or their representatives in General Assembly, freely given.

**SEC. 24. Militia and the right to bear arms.** A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice.

**In General.**—In *State v. Kerner*, 181 N. C. 574, 107 S. E. 222,



the Court said:—"The practical and safe construction is that which must have been in the minds of those who framed our organic law. The intention was to embrace the 'arms,' an acquaintance with whose use was necessary for their protection against the usurpation of illegal power—such as rifles, muskets, shotguns, swords, and pistols. These are now but little used in war, still they are such weapons that they or their like can still be considered as 'arms,' which they have a right to 'bear.'

"The maintenance of the right to bear arms is a most essential one to every free people, and should not be whittled down by technical constructions. It should be construed to include all such 'arms' as were in common use, and borne by the people when this provision was adopted. It does not guarantee on the one hand that the people have the futile right to use submarines and cannon of 100 miles range, nor aeroplanes dropping deadly bombs, or the use of poisonous gasses, nor on the other hand does it embrace dirks, daggers, slung-shots, and brass knuckles, which may be weapons, but are not, strictly speaking, 'arms' borne by the people at large, and which are generally carried concealed." *State v. Kerner*, 181 N. C. 574, 577, 107 S. E. 222.

**Carrying Pistols.**—In *State v. Kerner*, 181 N. C. 574, 577, 107 S. E. 222, the Court said:—"It is also but a reasonable regulation, and one which has been adopted in some of the states, to require that a pistol shall not be under a certain length, which, if reasonable, will prevent the use of pistols of small size, which are not borne as arms, but which are easily and ordinarily carried concealed. To exclude all pistols, however, is not a regulation, but a prohibition, of arms, which come under the designation of 'arms' which the people are entitled to bear."

A statute making the carrying of a weapon, specifying pistols, among other things, from the premises unconcealed, a misdemeanor and punishable the same as if carried concealed, unless a permit be first obtained upon a statement of the purpose for which it was to be carried, the payment of a \$5 license fee and the giving of a \$500 bond, exceeds the legislative power of police regulation and is in violation of the declaration of rights in our State Constitution, that "The right of the people to keep and bear arms shall not be infringed," with proviso that "nothing herein contained shall justify the practice of carrying concealed weapons or prevent the Legislature from enacting statutes against said practice." *Semble*, a pistol is included in the word "arms" *ex vi termini*. *State v. Kerner*, 181 N. C. 574, 107 S. E. 222.

**Reasonable Regulations Concerning Deadly Weapons.** — In *State v. Kerner*, 181 N. C. 574, 577, 107 S. E. 222, the Court said:—"It would also be a reasonable regulation, and not an infringement of the right to bear arms, to prohibit the carrying of deadly weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror, which was forbidden at common law. These from a practical standpoint are mere regulations, and would not infringe upon the object of the constitutional guarantee, which is to preserve to the people the right to acquire and retain a practical knowledge of the use of fire-arms."

**SEC. 25. *Right of the people to assemble together.*** The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the Legislature for redress of grievances. But secret political societies are dangerous to the liberties of a free people and should not be tolerated.

**SEC. 26. *Religious liberty.*** All men have a natural and unalienable right to worship Almighty God according to the dictates

of their own conscience, and no human authority should, in any case whatever, control or interfere with the rights of conscience.

See note of *State v. Suncrest Lumber Co.* Under section 3480.

SEC. 27. *Education.* The people have the right to the privilege of education, and it is the duty of the State to guard and maintain that right.

SEC. 28. *Elections should be frequent.* For redress of grievances, and for amending and strengthening the laws, elections should be often held.

SEC. 29. *Recurrence to fundamental principles.* A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.

SEC. 30. *Hereditary emoluments, etc.* No hereditary emoluments, privileges, or honors ought to be granted or conferred in this State.

SEC. 31. *Perpetuities, etc.* Perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed.

SEC. 32. *Ex post facto laws.* Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made. No law taxing retrospectively sales, purchases, or other acts previously done ought to be passed.

SEC. 33. *Slavery prohibited.* Slavery and involuntary servitude otherwise than for crime, whereof the parties shall have been duly convicted, shall be, and are hereby, forever prohibited within the State.

SEC. 34. *State boundaries.* The limits and boundaries of the State shall be and remain as they now are.

SEC. 35. *Courts shall be open.* All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay.

**Fanciful Rights and Imaginary Wrong.**—In *Carson v. Fleming*, 188 N. C. 600, 602, 125 S. E. 259, the Court said:—"This salutary principle does not justify the use of the courts, by the assertion of fanciful rights or by complaints based upon imaginary wrongs to hinder or delay others in the enjoyment of rights founded upon the law and in accord with justice and fair dealing among men."

SEC. 36. *Soldiers in time of peace.* No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war but in a manner prescribed by law.

SEC. 37. *Other rights of the people.* This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.



## ARTICLE II

## LEGISLATIVE DEPARTMENT

SECTION 1. *Two branches.* The legislative authority shall be vested in two distinct branches, both dependent on the people, to wit: a Senate and a House of Representatives.

SEC. 2. *Time of assembly.* The Senate and House of Representatives shall meet biennially on the first Wednesday after the first Monday in January next after their election; and when assembled shall be denominated the General Assembly. Neither house shall proceed upon public business unless a majority of all the members are actually present.

SEC. 3. *Number of senators.* The Senate shall be composed of fifty senators, biennially chosen by ballot.

SEC. 4. *Regulations in relation to districting the State for senators.* The Senate districts shall be so altered by the General Assembly, at the first session after the return of every enumeration by order of Congress, that each Senate district shall contain, as near as may be, an equal number of inhabitants, excluding aliens and Indians not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district, unless such county shall be equitably entitled to two or more senators.

SEC. 5. *Regulations in relation to apportionment of representatives.* The House of Representatives shall be composed of one hundred and twenty representatives, biennially chosen by ballot, to be elected by the counties respectively, according to their population, and each county shall have at least one representative in the House of Representatives, although it may not contain the requisite ratio of representation; this apportionment shall be made by the General Assembly at the respective times and periods when the districts for the Senate are hereinbefore directed to be laid off.

SEC. 6. *Ratio of representation.* In making the apportionment in the House of Representatives the ratio of representation shall be ascertained by dividing the amount of the population of the State, exclusive of that comprehended within those counties which do not severally contain the one hundred and twentieth part of the population of the State, by the number of representatives, less the number assigned to such counties; and in ascertaining the number of the population of the State, aliens and Indians not taxed shall not be included. To each county containing the said ratio and not twice the said ratio there shall be assigned one representative; to each county containing two but not three times the said ratio there shall be assigned two representatives, and so on



progressively, and then the remaining representatives shall be assigned severally to the counties having the largest fractions.

See notes to § 7642.

SEC. 7. *Qualifications for senators.* Each member of the Senate shall not be less than twenty-five years of age, shall have resided in this State as a citizen two years, and shall have usually resided in the district for which he was chosen one year immediately preceding his election.

SEC. 8. *Qualifications for representatives.* Each member of the House of Representatives shall be a qualified elector of the State, and shall have resided in the county for which he is chosen for one year immediately preceding his election.

SEC. 9. *Election of officers.* In the election of all officers, whose appointment shall be conferred upon the General Assembly by the Constitution, the vote shall be viva voce.

SEC. 10. *Powers in relation to divorce and alimony.* The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any individual case.

SEC. 11. *Private laws in relation to names of persons, etc.* The General Assembly shall not have power to pass any private law to alter the name of any person, or to legitimate any person not born in lawful wedlock, or to restore to the rights of citizenship any person convicted of an infamous crime, but shall have power to pass general laws regulating the same.

SEC. 12. *Thirty days' notice shall be given anterior to passage of private laws.* The General Assembly shall not pass any private laws, unless it shall be made to appear that thirty days' notice of application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law.

SEC. 13. *Vacancies.* If vacancies shall occur in the General Assembly by death, resignation or otherwise, writs of election shall be issued by the Governor under such regulations as may be prescribed by law.

SEC. 14. *Revenue.* No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

**Section Mandatory.** — The provisions of this section of the State's Constitution requiring, among other things, that the "Yea" and "Nay" vote shall be entered on the journal, in order for the people of the State, cities, or towns therein to pledge their faith or credit, etc., are manda-

tory, and the journals of each house, respectively, afford the only competent and sufficient evidence as to the procedure in a given case, and unless it affirmatively appears from these journals that the constitutional requirements have been complied with, the statute, in so far as it affects the specified measures, must be held invalid. *Allen v. Raleigh*, 181 N. C. 453, 107 S. E. 463.

**Where First or Second Reading on Same Day.**—The special enabling act, ratified March 6, 1925, is clearly unconstitutional because the journal of the state Senate affirmatively shows that the first and second readings of the bill in the Senate took place on the same day, in violation of this section. *Storm v. Wrightsville Beach* (N. C.), 128 S. E. 17, 20.

**After Motion to Reconsider Final Result Must Comply with Section.**—Where a bill has passed both branches of Legislature, complying with this section as to the pledging of credit by the State, counties, cities, and towns, a motion to reconsider may be had by a viva voce vote; and where allowed its effect is to abrogate the vote passed on the question and to again bring it forward to be discussed and decided in the same manner as it was originally for the consideration and determination of the General Assembly; and for the act to be valid the final result must have complied with the constitutional requirements as to its reading on the several days, the taking of the "Aye" and "Nay" vote, and their proper entry upon the respective journals. *Allen v. Raleigh*, 181 N. C. 453, 107 S. E. 463.

**Failure to Record "No" Vote.**—A bill to authorize a county to pledge its faith and credit by issuing bonds for road purposes, and duly ratified, it not invalid for the failure to meet the requirements of this section of that State Constitution, requiring that all bills of this character shall be read three several times in each house of the General Assembly, and pass three several readings on different days by each house respectively, with the "aye" and "no" vote entered on the journals of each house on the second and third readings, by reason of the failure to record on the journal on the second reading in one of the branches of legislation the "no" vote, when it is made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the entries of the names of those voting in the negative showing that there was none. *Leonard v. Board*, 185 N. C. 527, 117 S. E. 580.

**Ratification by the Legislature of Act Originally Infirm.**—Where a statute is void only because of a neglected omission of formal constitutional requirements, and is of a subject-matter within its authority, the observation of these requirements in a later act amending the first one cures the defect therein and gives validity thereto, in the absence of intervening rights to the contrary. *Board v. Board*, 183 N. C. 300, 111 S. E. 531.

In *Board v. Board*, 183 N. C. 300, 302, 111 S. E. 531, the Court said:—"Where the Legislature has undertaken to pass a law, clearly within its power to enact, and by reason of some defect in its passage the statute is rendered ineffectual, we see no reason why the Legislature, in the absence of any opposite intervening rights, could not, by subsequent enactment, ratify and confirm the results of such proceedings as in good faith have been taken and had under the prior defective act."

In a suit by the commissioners of a school district within a county under the provisions of C. S., 5681, to compel the county commissioners to deliver to it certain school bonds for negotiation that the voters of the district had approved at an election held according to the statutory provisions affecting them, it appeared that the issue was in the sum of \$75,000, or \$50,000 in excess of the amount authorized by C. S., 5678, and that the original act had not been passed in accordance with the requirement of our Constitution, this section, but was later ratified by the



Legislature in conformity therewith. There being no intervening vested rights, it was held, the former infirmity of the bonds was cured by the later act, and a judgment in favor of the plaintiffs was a proper one. *Board v. Board*, 183 N. C. 300, 111 S. E. 531.

**Substitute Bill Regarded as Amendment to Original.**—Where a bill, authorizing a levy of taxes for road purposes, has been read, referred to a committee, and the committee has recommended a substitute, resulting in the tabling of the original bill and the passing of the substitute on two separate days in that branch of legislation, and otherwise conforming to the requirements of this section as to the “aye” and “no” vote, etc., and its passing on separate days, etc., in both branches of legislation, the substitute is to be regarded, in the contemplation of the Constitution, as an amendment to the original bill introduced, and the act may not successfully be questioned as not having passed on the several separate days required of a bill of this character. *Edwards v. Nash County Board*, 183 N. C. 58, 110 S. E. 600.

SEC. 15. *Entails.* The General Assembly shall regulate entails in such a manner as to prevent perpetuities.

SEC. 16. *Journals.* Each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly.

SEC. 17. *Protest.* Any member of either house may dissent from, and protest against, any act or resolve which he may think injurious to the public, or any individual, and have the reason of his dissent entered on the journal.

SEC. 18. *Officers of the House.* The House of Representatives shall choose their own speaker and other officers.

SEC. 19. *President of the Senate.* The Lieutenant-Governor shall preside in the Senate, but shall have no vote unless it may be equally divided.

SEC. 20. *Other senatorial officers.* The Senate shall choose its other officers and also a speaker (pro tempore) in the absence of the Lieutenant-Governor, or when he shall exercise the office of Governor.

SEC. 21. *Style of the acts.* The style of the acts shall be: “The General Assembly of North Carolina do enact.”

SEC. 22. *Powers of the General Assembly.* Each house shall be judge of the qualifications and election of its own members, shall sit upon its own adjournment from day to day, prepare bills to be passed into laws; and the two houses may also jointly adjourn to any future day, or other place.

See note to § 870.

**Contested Election for General Assembly—Quo Warranto.**—The constitution of our state withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly (this section), and an action of quo warranto will not lie under our statute. *State v. Pharr*, 179 N. C. 699, 103 S. E. 8.

SEC. 23. *Bills and resolutions to be read three times, etc.* All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses.



SEC. 24. *Oath of members.* Each member of the General Assembly, before taking his seat, shall take an oath or affirmation that he will support the Constitution and laws of the United States, and the Constitution of the State of North Carolina, and will faithfully discharge his duty as a member of the Senate or House of Representatives.

SEC. 25. *Terms of office.* The terms of office for senators and members of the house of representatives shall commence at the time of their election.

SEC. 26. *Yeas and nays.* Upon motion made and seconded in either house by one-fifth of the members present, the yeas and nays upon any question shall be taken and entered upon the journals.

SEC. 27. *Election for members of the General Assembly.* The election for members of the General Assembly shall be held for the respective districts and counties, at the places where they are now held, or may be directed hereafter to be held, in such manner as may be prescribed by law, on the first Thursday in August, in the year one thousand eight hundred and seventy, and every two years thereafter. But the General Assembly may change the time of holding the elections.

SEC. 28. *Pay of members and officers of the General Assembly; extra session.* The members of the General Assembly for the term for which they have been elected shall receive as a compensation for their services the sum of four dollars per day for each day of their session, for a period not exceeding sixty days; and should they remain longer in session they shall serve without compensation. They shall also be entitled to receive ten cents per mile, both while coming to the seat of government and while returning home, the said distance to be computed by the nearest line or route of public travel. The compensation of the presiding officers of the two houses shall be six dollars per day and mileage. Should an extra session of the General Assembly be called, the members and presiding officers shall receive a like rate of compensation for a period not exceeding twenty days.

SEC. 29. *Limitations upon power of General Assembly to enact private or special legislation.* The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace; relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns, and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges; relating to nonnavigable streams; relating to cemeteries; relating to the pay of jurors; erecting new townships, or changing township lines, or establishing or changing the lines of school districts; remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the

public treasury; regulating labor, trade, mining, or manufacturing; extending the time for the assessment or collection of taxes, or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability; giving effect to informal wills and deeds; nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private, or special laws enacted by it. Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section.

See notes to Art. V, § 1.

**In General.**—This amendment to the Constitution must be defined by reference to the context and existing conditions, and is sufficiently ambiguous to admit of interpretation. In *re Harris*, 183 N. C. 633, 112 S. E. 425.

**What Are Local Laws.**—The interpretation of a statute, as to whether it is a local one, prohibited by this section of our Constitution, under the recent amendment, should be largely left to the facts and circumstances of each particular case, giving significance to the rule that legislative acts are presumed to have been rightfully passed from proper motives, and that a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid. In *re Harris*, 183 N. C. 633, 112 S. E. 425.

**Erection of Hospital.**—An act authorizing a certain county to erect a tuberculosis hospital and issue bonds therefor, and provide a tax of eight cents on the \$100 valuation of its property for its maintenance, upon the approval of the voters, is both a special and local act and void under our Constitution, this section, prohibiting laws of this character appertaining to "health," "sanitation," etc. *Armstrong v. Board*, 185 N. C. 405, 117 S. E. 388.

**Establishment of Recorders' Courts.**—A general law permitting the establishment of Recorder's courts in the State, excepting certain counties to the number of 44, leaving 56 within the provisions of the statute, is not a local law within the intent and meaning of this section of our Constitution (a recent amendment), nor is a statute amending the former general law taking a certain county and two others out of the excepted class enumerated in the general statutes, unconstitutional as a local or special act as to those counties, the effect of this statute being a reenactment of the general law including the particular counties. In *re Harris*, 183 N. C. 633, 112 S. E. 425.

In applying this section to the establishment of recorders' courts, the court will take cognizance of the efficiency and the number of such courts theretofore existent, and the more recent statutes under which other such courts have been added, and the fact that at the time of the enactment of the original statute affecting the question there were 56 counties in the State within which they have been established, with only 44 counties to the contrary, in determining whether an amendment to a recent statute permitting several additional counties to establish them comes within the constitutional inhibition as a local law. In *re Harris*, 183 N. C. 633, 112 S. E. 425.

**Construction of Interstate Bridges.**—The authority that a Legislature of this State has to unite with an adjoining State in constructing and maintaining a bridge over a stream on a state line, may be delegated by a general statute to the commissioners of any county lying on the stream, to take proper action, bear the cost, and adjust its con-



tribution with the authorities of the county lying on the other side of the stream. *Emery v. Commissioners*, 181 N. C. 420, 107 S. E. 443.

**Issuance of County Road Bonds.**—An act of the Legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section, of our State Constitution, prohibiting the Legislature from passing local, private or special act relating to the subject. *Road Comm'rs v. Bank*, 181 N. C. 347, 107 S. E. 245.

**Maintenance of County Highways.**—A public-local law applicable to the maintenance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, with certain specific supervision and control, is not such local or special act as falls within the inhibition of our Constitution this section, where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways, etc. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755.

Where an earlier public-local law provides for taxation or a bond issue for the maintenance of highway districts within the county, and a later statute is passed providing in addition for the working of the roads for several days out of the year by all able-bodied men between certain ages, or, in lieu thereof, the payment of a certain sum of money, the later law does not impair the obligations of a contract and fall within the inhibition of our Constitution, but tends to increase the value of the road bonds issued under the provisions of the earlier statute. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755.

**County Road Commissioners.**—A public-local act incorporating road commissioners of a county, and giving them the powers, rights, duty and authority, as to the highways of that county, etc., that were formerly held by the county commissioners, does not contravene this section, of the State Constitution, in depriving the board of county commissioners of certain powers relating to the public roads therein. *Road Comm'rs v. Bank*, 181 N. C. 347, 107 S. E. 245.

A statute that abolishes two boards of road commissioners in a county and gives to another board, created by the same act, entire control and management of the public roads and bridges of the county, for working, repairing, maintaining, altering, and constructing such roads as were then in existence or which may thereafter be built, does not violate this section of our State Constitution, prohibiting the passage of local, private, or special acts authorizing the laying out, opening, altering, etc., of highways, streets, or alleys, etc., and is a constitutional and valid enactment. *Huneycutt v. Commissioners*, 182 N. C. 319, 109 S. E. 4.

**Formation of Sewerage Districts.**—The courts may not declare a statute unconstitutional unless clearly and manifestly so: and held, where a statute authorizes the formation of sanitary sewerage districts within county-wide limits, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, the statute will not be construed as unconstitutional on that account, or as a "local, private or special act relating to health, sanitation," etc. *Reed v. Howerton Engineering Co.*, 188 N. C. 39, 123 S. E. 479.

**Ratification of Invalid Ordinance.**—An act which authorizes a high school district, sought to be established under an invalid resolution of the county commissioners, to issue bonds and levy taxes for school purposes, is itself invalid to confer such authority; and an act for the purpose of ratifying such ordinance, passed since the adoption of this section is a local, private, or special act thereby prohibited; and the



issuance of such bonds and levy of such taxes, will be permanently enjoined. *Woosley v. Commissioners*, 182 N. C. 429, 109 S. E. 368.

**Machinery to Effect Void Act.**—Where an act to create a public school district is unconstitutional, because it violates this section, the provision for bonds and taxation to carry out the purpose of the act are likewise void. *Sechrist v. Commissioners*, 181 N. C. 511, 107 S. E. 503.

A special or local act authorizing a county to maintain a tuberculosis hospital being contrary to the provisions of our Constitution, this section, its further provisions as to issuing the bonds for its erection and the levy of a special tax for its maintenance, are likewise void. *Armstrong v. Board*, 185 N. C. 405, 117 S. E. 388.

While this section of our Constitution has been held not to withdraw from the Legislature power by special legislation to authorize counties, etc., to provide proper revenue for advancing proper governmental purposes, though local in character, the decisions refer to legislation providing proper revenue for recognized and established objects, such as roads, bridges, and the like, and not to those prohibited by our organic law, as where the county under a special local act seeks to establish and maintain a tuberculosis hospital, which is not a necessary county expense; and the legislation being unconstitutional as to its dominant purposes, that part providing for the issuance of bonds and a levy of tax for this purpose is also invalid. *Armstrong v. Board*, 185 N. C. 405, 117 S. E. 388.

**School Districts—Establishing or Changing Lines.**—Since the enforcement of the amendment to our Constitution, this section, special act of the Legislature to establish or change the lines, etc., of a school district, and any proceedings under it, are null and void. *Galloway v. Board*, 184 N. C. 245, 114 S. E. 165.

A statute which creates a public school district and allows a bond issue, upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by the Constitution, this section, requiring that legislation of this character must be by general provision of law. *Robinson v. Board*, 182 N. C. 590, 109 S. E. 855.

A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the recent amendment to our Constitution forbidding the general assembly from enacting any local or special acts to establish or change the lines of school districts making them void, and requiring legislation of this character by general provisions of law. Constitution, this section. *Board v. Mutual Loan, etc., Co.*, 181 N. C. 306, 107 S. E. 130.

An act automatically creating a school district coterminous with the lines of a certain township in a county, if the voters should by their ballot approve of bonds to be issued and taxes levied for the maintenance, etc., of the school district for certain purposes named in the act, is invalid under the recent amendments to our Constitution this section, prohibiting the General Assembly from passing any local, private, or special act or resolution relating to the establishing, etc., or changing the lines of school districts. *Board v. Mutual Loan, etc., Co.*, 181 N. C. 306, 107 S. E. 130, cited, approved, and applied; *Sechrist v. Commissioners*, 181 N. C. 511, 107 S. E. 503.

In conformity with the Municipal Finance Act, a city voted for the issuance of bonds, in a certain amount, for purchasing land and erecting buildings for public-school purposes, and issued half thereof and contracted for the use of the full balance of the bonds: Held, a later public-local act that enlarged the city limits and recognized therein the independent existence of a public-school district within the former limits is not contrary to the provisions of our recent amendment to

our Constitution, this section, as an attempt to establish a school district, or to change the limits of those already established. *Duffy v. Greensboro*, 186 N. C. 470, 120 S. E. 53.

**Same—Incorporation of Existing Districts.**—Laws 1921, ch. 123, sec. 4, among other things incorporating existing local school districts for all purposes relating to the issuance or payment of bonds upon the approval of the voters of a district, is valid, independent of section 1 thereof, and not in contravention to our recent constitutional amendment, this section prohibiting the incorporation of new school districts by special legislative enactment. *Board v. Mutual Loan, etc., Co.*, 181 N. C. 306, 107 S. E. 130; *Paschal v. Johnson*, 183 N. C. 129, 110 S. E. 841.

**Same—Increase of Bonds by Existing District.**—Where a school district has been defined as to its boundaries, etc., and created under the provisions of a statute valid before the adoption of the amendment to our State Constitution, this section and which authorized a bond issue in a certain sum, a statute passed since the adoption of this constitutional amendment authorizing an increase of the bonds to be issued, upon the approval of the voters according to the statutory amendment, does not contravene the constitutional amendment as to "establishing or changing the lines of school districts," the lines established under the prior valid statute remaining the same. *Roebuck v. Board*, 184 N. C. 144, 113 S. E. 676.

Where the only purpose of statutory amendment to an act passed prior to the adoption of this section of our Constitution is to authorize an increase in the amount of bonds to be issued by a school district for school purposes, upon the adoption of the statutory amendment by the voters of the district, the act of the voters in approving the statutory amendment is a vote to authorize and approve the issuance of the bonds, and to vest power in the trustees of the school district for that purpose. *Roebuck v. Board*, 184 N. C. 144, 113 S. E. 676.

**Same—Consolidating Special or Nonspecial Tax Territory.** — Where a school district has been made of consolidated special tax and nonspecial tax territory, by the county board of education, and thereafter, at an election held for the purpose, according to law, the question of taxation for school purposes has been submitted to each of the old districts comprising the new or consolidated one, and they each have voted favorably upon the question, the result is not the levying a tax upon the nonspecial tax district without the legal approval of the voters therein, and the taxation so approved is constitutional and valid. *Burney v. Commissioners*, 184 N. C. 274, 114 S. E. 298.

Where special school tax districts have been combined with nontax territory, public-local act to provide an additional tax to that of the special tax districts, and to equalize the benefits among them all for the better equipment of the schools, better pay for the teachers, the transportation of the scholars, expressly leaving intact the boundary lines and management of the schools of each of the districts so consolidated, the question of this supplementary taxation to be submitted to the voters of the enlarged or consolidated district made for the purpose, is not in contravention of this section of the State Constitution, prohibiting the Legislature from enacting local, private, or special acts establishing or changing the lines of school districts. *Coble v. Commissioners*, 184 N. C. 342, 114 S. E. 487.

**SEC. 30. *Inviolability of sinking funds.*** The General Assembly shall not use nor authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which said sinking fund has been created.



## ARTICLE III

## EXECUTIVE DEPARTMENT

SECTION 1. *Officers of the executive department; terms of office.* The executive department shall consist of a Governor, in whom shall be vested the supreme executive power of the State; a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, and an Attorney-General, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected. Their term of office shall commence on the first day of January next after their election, and continue until their successors are elected and qualified: *Provided*, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their office four years from and after the first day of January.

SEC. 2. *Qualifications of Governor and Lieutenant-Governor.* No person shall be eligible as Governor or Lieutenant-Governor unless he shall have attained the age of thirty years, shall have been a citizen of the United States five years, and shall have been a resident of this State for two years next before the election; nor shall the person elected to either of these two offices be eligible to the same office more than four years in any term of eight years, unless the office shall have been cast upon him as Lieutenant-Governor or president of the Senate.

SEC. 3. *Returns of election.* The return of every election for officers of the executive department shall be sealed up and transmitted to the seat of government by the returning officer, directed to the Speaker of the House of Representatives, who shall open and publish the same in the presence of a majority of the members of both houses of the General Assembly. The persons having the highest number of votes respectively shall be declared duly elected; but if two or more be equal and highest in votes for the same office, then one of them shall be chosen by joint ballot of both houses of the General Assembly. Contested elections shall be determined by a joint ballot of both houses of the General Assembly, in such manner as shall be prescribed by law.

SEC. 4. *Oath of office for Governor.* The Governor, before entering upon the duties of his office, shall, in the presence of the members of both branches of the General Assembly, or before any justice of the Supreme Court, take an oath or affirmation that he will support the Constitution and laws of the United States and of the State of North Carolina, and that he will faithfully perform the duties appertaining to the office of Governor to which he has been elected.

SEC. 5. *Duties of Governor.* The Governor shall reside at the



seat of government of this State, and he shall, from time to time, give the General Assembly information of the affairs of the State, and recommend to their consideration such measures as he shall deem expedient.

SEC. 6. *Reprieves, commutations and pardons.* The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall biennially communicate to the General Assembly each case of reprieve, commutation, or pardon granted, stating the name of each convict, the crime for which he was convicted, the sentence and its date, the date of commutation, pardon, or reprieve, and the reasons therefor.

SEC. 7. *Annual reports from officers of executive department and of public institutions.* The officers of the executive department and of the public institutions of the State shall, at least five days previous to each regular session of the General Assembly, severally report to the Governor, who shall transmit such reports, with his message, to the General Assembly; and the Governor may, at any time, require information in writing from the officers in the executive department upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed.

SEC. 8. *Commander-in-chief.* The Governor shall be Commander-in-chief of the militia of the State, except when they shall be called into the service of the United States.

SEC. 9. *Extra session of General Assembly.* The Governor shall have power on extraordinary occasions, by and with the advice of the Council of State, to convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened.

SEC. 10. *Officers whose appointments are not otherwise provided for.* The Governor shall nominate, and by and with the advice and consent of a majority of the senators-elect, appoint all officers whose offices are established by this Constitution and whose appointments are not otherwise provided for.

SEC. 11. *Duties of the Lieutenant-Governor.* The Lieutenant-Governor shall be president of the Senate, but shall have no vote unless the Senate be equally divided. He shall, whilst acting as president of the Senate, receive for his services the same pay which shall, for the same period, be allowed to the speaker of the House of Representatives; and he shall receive no other compensation except when he is acting as Governor.

SEC. 12. *In case of impeachment of Governor, or vacancy caused by death or resignation.* In case of the impeachment of the Governor, his failure to qualify, his absence from the State,

his inability to discharge the duties of his office, or in case the office of Governor shall in anywise become vacant, the powers, duties and emoluments of the office shall devolve upon the Lieutenant-Governor until the disabilities shall cease or a new Governor shall be elected and qualified. In every case in which the Lieutenant-Governor shall be unable to preside over the Senate, the senators shall elect one of their own number president of their body; and the powers, duties and emoluments of the office of Governor shall devolve upon him whenever the Lieutenant-Governor shall, for any reason, be prevented from discharging the duties of such office as above provided, and he shall continue as acting Governor until the disabilities are removed or a new Governor or Lieutenant-Governor shall be elected and qualified. Whenever, during the recess of the General Assembly, it shall become necessary for the president of the Senate to administer the government, the Secretary of State shall convene the Senate, that they may elect such president.

SEC. 13. *Duties of other executive officers.* The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, and Attorney-General shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article.

See ch. 50, § 169.

SEC. 14. *Council of State.* The Secretary of State, Auditor, Treasurer, and Superintendent of Public Instruction shall constitute, ex officio, the Council of State, who shall advise the Governor in the execution of his office, and three of whom shall constitute a quorum; their advice and proceedings in this capacity shall be entered in a journal, to be kept for this purpose exclusively, and signed by the members present, from any part of which any member may enter his dissent; and such journal shall be placed before the General Assembly when called for by either house. The Attorney-General shall be, ex officio, the legal adviser of the executive department.

SEC. 15. *Compensation for executive officers.* The officers mentioned in this article shall, at stated periods, receive for their services a compensation to be established by law, which shall neither be increased nor diminished during the time for which they shall have been elected, and the said officers shall receive no other emolument or allowance whatever.

SEC. 16. *Seal of State.* There shall be a seal of the State, which shall be kept by the Governor, and used by him, as occa-



sion may require, and shall be called "The Great Seal of the State of North Carolina." All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with "The Great Seal of the State," signed by the Governor, and countersigned by the Secretary of State.

SEC. 17. *Department of Agriculture, Immigration, and Statistics.* The General Assembly shall establish a Department of Agriculture, Immigration, and Statistics, under such regulations as may best promote the agricultural interests of the State, and shall enact laws for the adequate protection and encouragement of sheep husbandry.

## ARTICLE IV

### JUDICIAL DEPARTMENT

SECTION 1. *Abolishes distinction between actions at law and suits in equity, and feigned issues.* The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the State as a party, against a person charged with a public offense, for the punishment of the same, shall be termed a criminal action. Feigned issues shall also be abolished, and the facts at issue tried by order of court before a jury.

**Distinction between Principles Not Abolished.**—Equity is now administered in the same courts as matters of law, but the distinction between equitable and legal principles have not been abolished. *Waters v. Garriss*, 188 N. C. 305, 124 S. E. 334.

**Pleadings Amended by Court.**—Where the complaint is construed to be sufficient to sustain the suit for specific performance, objection for indefiniteness or that the action sounded in damages in a court of law, must be made in apt time; and where good cause of action is stated for equitable relief, but defective in form, the court may require the pleadings to be made definite and certain by amendment, the distinction between suits in equity and actions at law as to jurisdictional matters being abolished by this section. *Green v. Harshaw*, 187 N. C. 213, 121 S. E. 456.

**The courts of justices of the peace have no jurisdiction over the equity of correcting an account and settlement stated and had between the parties, so as to surcharge or falsify it for fraud or specified error, nor will the Superior Court acquire such jurisdiction on appeal.** *Morganton v. Millner*, 181 N. C. 364, 107 S. E. 209.

In *Morganton v. Millner*, 181 N. C. 364, 107 S. E. 209, Clark, J., dissenting, said: "It will appear from this section that the distinction which formerly was deemed most essential between the actions at law and suits in equity and the forms of all such actions and suits were absolutely abolished in this State. There is nothing that indicates that that abolition applied only to the Superior Courts. The distinction was absolutely abolished, and could no longer have any existence in any court in this State by whatever name it might be called—whether it was a justice of the peace, a city court, a county court, a Superior Court, or the Supreme Court. Any decisions to the contrary are in contradiction of the very

language of the Constitution, which could not be more explicitly or plainly expressed than it is written."

SEC. 2. *Division of judicial powers.* The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law.

See notes to § 7590.

SEC. 3. *Trial court of impeachment.* The court for the trial of impeachments shall be the Senate. A majority of the members shall be necessary to a quorum, and the judgment shall not extend beyond removal from and disqualification to hold office in this State; but the party shall be liable to indictment and punishment according to law.

SEC. 4. *Impeachment.* The House of Representatives solely shall have the power of impeaching. No person shall be convicted without the concurrence of two-thirds of the senators present. When the Governor is impeached the Chief Justice shall preside.

SEC. 5. *Treason against the State.* Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. No conviction of treason or attainder shall work corruption of blood or forfeiture.

SEC. 6. *Supreme Court justices.* The Supreme Court shall consist of a Chief Justice and four associate justices.

SEC. 7. *Terms of the Supreme Court.* The terms of the Supreme Court shall be held in the city of Raleigh, as now, until otherwise provided by the General Assembly.

SEC. 8. *Jurisdiction of Supreme Court.* The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over "issues of fact" and "questions of fact" shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.

See note to *Hardy v. Heath*, 188 N. C. 277 under section 12 of Art. IV.

**What Reviewable.**—On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126.

**The granting or refusing of a petition for a certiorari**, under the provisions of this section and C. S., 630, passed in pursuance thereof, is a matter within the discretion of the Supreme Court, and will not be issued when it will serve no good purpose. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751.

The rules of practice regulating the docketing of appeals in the Supreme Court will be enforced uniformly regardless of any agreement to the contrary that the attorneys for the parties may have made in any



particular case; and when for any reason the case itself may not reasonably have been docketed by the appellant within the time prescribed by the rules, he must docket the record proper within that time, and move for a certiorari, which may be allowed by the court on sufficient showing made. *State v. Farmer*, 188 N. C. 243, 124 S. E. 562.

**Habeas Corpus.**—No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitioner in habeas corpus proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of certiorari which lies in the discretion of the appellate court; and an appeal by the petitioner under sentence for contempt of court will ordinarily be dismissed. In this case with the consent of the attorney-general, the court passes upon the appeal as if on certiorari. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351; *State v. Yates*, 183 N. C. 753, 111 S. E. 337.

The prisoner, rearrested for violating the conditions of a parol granted by the governor after the term of his sentence had expired, sued out habeas corpus proceedings, and upon the denial of his claim of right to be set at liberty, appealed to the Supreme Court: Held, certiorari being the proper procedure, the appeal is dismissed, but its merits passed upon as being a question of public importance and general interest. In *re Sermon's Land*, 182 N. C. 122, 127, 108 S. E. 497; *Penn-Allen Cement Co. v. Phillips*, 182 N. C. 437, 440, 109 S. E. 257; *State v. Yates*, 183 N. C. 753, 111 S. E. 337.

Where a parent erroneously seeks the custody of a minor child of a marriage by proceedings in habeas corpus, after decree of divorce has been entered upon suit in the court of a certain county, without providing therefor, the Supreme Court, on appeal, having regard for the best interest of such child before the motion can be made in the court having granted the divorce, may exercise its powers given by Const., this section, to generally supervise and control the proceedings of the inferior courts by remedial writ, or process; and on this appeal from an order of the Superior Court judge, erroneously hearing the matter upon proceedings in habeas corpus, the Supreme Court adjudges that the custody of the child shall remain with the mother, as directed by the judge hearing the same, until the mother can properly seek her relief upon motion made in the action granting the divorce at the next term of the said court, or as soon thereafter as the judge may hear the same, upon giving the respondent ten days previous notice of her application. In *re Blake*, 184 N. C. 278, 114 S. E. 294.

**Motion to Set Aside Default Judgment.** — The supreme court has jurisdiction to review, on appeal, an order of the superior court on motion to set aside a default judgment for mistake, surprise, etc. *Caldwell v. Caldwell* (N. C.), 128 S. E. 329.

**SEC. 9. *Claims against the State.*** The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action.

**Consent of State.**—A state cannot be sued in its own courts or elsewhere unless it has expressly consented to such suit, by statutes or in cases authorized by provisions in the organic law, instances by Art. II, Const. U. S., and this section of the Const. of North Carolina. *Carpenter v. Atlantic, etc., R. Co.*, 184 N. C. 400, 114 S. E. 693.

**SEC. 10. *Judicial districts for Superior Courts.*** The State shall be divided into nine judicial districts, for each of which a judge shall be chosen; and there shall be held a Superior Court in each county at least twice in each year, to continue for such time in

each county as may be prescribed by law. But the General Assembly may reduce or increase the number of districts.

SEC. 11. *Residences of judges; rotation in judicial districts; special terms.* Every judge of the Superior Court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years; but in case of the protracted illness of the judge assigned to preside at any district, or of any other unavoidable accident to him, by reason of which he shall be unable to preside, the Governor may require any judge to hold one or more specified terms in said district in lieu of the judge assigned to hold the courts of the said district; and the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold; and the General Assembly shall provide for their reasonable compensation.

**Emergency judges**, appointed under the provisions of our statute as to Supreme and Superior court judges who have retired from active service in pursuance of the provisions of our Constitution, have no jurisdiction to hear and determine, at chambers, a matter of mandamus, or when not holding a term of court assigned to them. *Dunn v. Taylor*, 186 N. C. 254, 119 S. E. 495.

SEC. 12. *Jurisdiction of courts inferior to Supreme Court.* The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coördinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding, in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution.

**Authority of General Assembly.**—The General Assembly has constitutional authority to distribute among the other courts prescribed in the Constitution, that portion of judicial power and jurisdiction which does not pertain to the Supreme Court. *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482.

**Supreme Court Rules.**—The Supreme Court is given, by this section of the Constitution, exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Court will be observed. *Cooper v. Board of Commissioners*, 184 N. C. 615, 113 S. E. 569.

The rules prescribed by the Supreme Court to regulate its own proce-



dure, including the rule as to dismissing an appeal thereto if not docketed, or a recordari prayed for in apt time, will be strictly enforced. Being under the exclusive authority therein given to the Supreme Court by the Constitution, Art. I, sec. 8, as distinguished from procedure applying to courts inferior thereto, this section, a statute in conflict therewith will not be observed. *State v. Ward*, 184 N. C. 618, 113 N. C. 775.

The rules of practice regulating the docketing in the Supreme Court cases appealed thereto is exclusively left to that Court by the Constitution, Art. IV, section 8 and this section which cannot be affected or changed either by statute or the agreement of parties; and in order to properly bring the case before the Court for it to exercise its discretionary power to afford relief under peculiar circumstances arising in a particular case, the record proper must be docketed in strict accordance with the requirements of the rule, and a certiorari accordingly applied for on motion to the Court and in the time required. *Hardy v. Heath*, 188 N. C. 271, 124 S. E. 564.

**Equitable Matters Cognizable by Justices.**—In *Hall v. Artis*, 186 N. C. 105, 108, 118 S. E. 901, the court said: "Indeed, there is nothing which deprives even a justice of the peace of the right to pass upon equitable matters when within the amount allotted for his jurisdiction. It is true that a justice of the peace cannot issue an injunction or mandamus, or take action in some other matters, but this is not because the Legislature cannot confer jurisdiction in those matters, but because in allotting the distribution 'of that portion of the judicial power and jurisdiction which does not pertain to the Supreme Court among the courts inferior to the Supreme Court,' the Legislature has not conferred upon justices of the peace jurisdiction of injunctions, mandamus and other remedies."

SEC. 13. *In case of waiver of trial by jury.* In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury; in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury.

**Waiver.**—The constitutional right to a trial by jury, in civil actions, may be waived by the parties as provided by our statutes, C. S., 568, 572. *Green Sea Lumber Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119.

**Same—Validity of Section 4610.**—C. S., 4610, authorizing the waiver of an indictment in the Superior Court by the defendant bound over from an inferior court, is constitutional and valid. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

SEC. 14. *Special courts in cities.* The General Assembly shall provide for the establishment of special courts, for the trial of misdemeanors, in cities and towns, where the same may be necessary.

SEC. 15. *Clerk of the Supreme Court.* The clerk of the Supreme Court shall be appointed by the Court, and shall hold his office for eight years.

SEC. 16. *Election of Superior Court clerk.* A clerk of the Superior Court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the General Assembly.

SEC. 17. *Term of office.* Clerks of the Superior Courts shall hold their offices for four years.

SEC. 18. *Fees, salaries and emoluments.* The General Assembly shall prescribe and regulate the fees, salaries, and emolu-

ments of all officers provided for in this article; but the salaries of the judges shall not be diminished during their continuance in office.

**Taxing Salaries of Judges.**—The statute taxing salaries and incomes generally is presumed to have been passed with the knowledge by the Legislature of the constitutional inhibition to diminish the salaries of the judges during their continuance in office, also of the decisions of our court thereon and the policy of the State in respect thereto, as gathered from the organic law; and where the statute is silent on the subject, the legislative intent will not be construed to authorize its designated agent to diminish such salaries by the imposition of a tax thereon, whether regarded as a tax upon an income or otherwise. *Long v. Watts*, 183 N. C. 99, 110 S. E. 765.

An increase of the salaries of the judges during a term of office is the fixing of their salary by the Legislature in such amount as in its judgment is a proper compensation for their services, and an attempt by an agency of the Legislature, either under actual or mistaken authority, to impose a tax thereon is an attempt to diminish these salaries during the term of office. *Long v. Watts*, 183 N. C. 99, 110 S. E. 765.

**Same—Not Affected by Amendment of 1920.**—The constitutional restriction of the Legislature not to diminish salaries of the judges during their continuance in office is still in force, unaffected or disturbed by the amendment of 1920, to Art. 5, § 1 and though their income from other sources may be taxed, a tax on their salaries during their term of office is to diminish their income from such source in contravention of the express terms of the Constitution, this section, further indicated by Art. I, sec. 8, providing that "the legislative, executive, and supreme judicial powers of the Government ought to be forever separate and distinct from each other." *Long v. Watts*, 183 N. C. 99, 110 S. E. 765.

The authority given to the Legislature by the Constitution of 1868 to tax salaries, incomes, etc., is not affected or repealed by the amendment of 1920 to Art. 5, § 1, but thereunder additional power is given to tax incomes when the property from which the same is derived is taxed, except in prohibited instances. *Long v. Watts*, 183 N. C. 99, 110 S. E. 765. •

**Same—Duty of Supreme Court to Pass upon Rights.**—It is the duty of the Supreme Court to pass upon the rights of one of the judges of the State as a citizen thereof, when he, in a case properly presented, denies the constitutional right of the State or one of its designated agencies, to tax his salary paid to him as one of its judges, being in contravention of this section, prohibiting the Legislature from diminishing the salaries of the judges during their continuance in office. *Long v. Watts*, 183 N. C. 99, 110 S. E. 765.

**SEC. 19.** *What laws are, and shall be, in force.* The laws of North Carolina, not repugnant to this Constitution or the Constitution and laws of the United States, shall be in force until lawfully altered.

**SEC. 20.** *Disposition of actions at law and suits in equity pending when this Constitution shall go into effect, etc.* Actions at law and suits in equity pending when this Constitution shall go into effect shall be transferred to the courts having jurisdiction thereof, without prejudice by reason of the change; and all such actions and suits commenced before and pending at the adoption by the General Assembly of the rules of practice and procedure herein provided for shall be heard and determined according to the practice now in use, unless otherwise provided for by said rules.



SEC. 21. *Election, terms of office, etc., of justices of the Supreme and judges of the Superior courts.* The justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The judges of the Superior Courts, elected at the first election under this amendment, shall be elected in like manner as is provided for justices of the Supreme Court and shall hold their offices for eight years. The General Assembly may from time to time provide by law that the judges of the Superior Courts, chosen at succeeding elections, instead of being elected by the voters of the whole State, as is herein provided for, shall be elected by the voters of their respective districts.

SEC. 22. *Transaction of business in the Superior Courts.* The Superior Courts shall be, at all times, open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury.

SEC. 23. *Solicitors for each judicial district.* A solicitor shall be elected for each judicial district by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf of the State in all criminal actions in the Superior Courts, and advise the officers of justices in his district.

**Issuance of Capias.**—A solicitor is the most responsible officer of the court and has been spoken of as "its right arm." He is a constitutional officer and his duties are presented by the constitution. The court has not authority to give the solicitor discretion as to when a capias shall issue, this not being within his duties. *State v. Mc Abbee*, 189 N. C. 320, 127 S. E. 204.

SEC. 24. *Sheriffs and coroners.* In each county a sheriff and coroner shall be elected by the qualified voters thereof, as is prescribed for members of the General Assembly, and shall hold their offices for two years. In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for two years. When there is no coroner in a county, the clerk of the Superior Court for the county may appoint one for special cases. In case of a vacancy existing for any cause in any of the offices created by this section, the commissioners of the county may appoint to such office for the unexpired term.

SEC. 25. *Vacancies.* All vacancies occurring in the offices provided for by this article of the Constitution shall be filled by the appointments of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices. If any person, elected or appointed to any of said offices, shall neglect and fail to qualify, such offices shall be appointed to, held and filled as provided in case of vacan-

cies occurring therein. All incumbents of said offices shall hold until their successors are qualified.

SEC. 26. *Terms of office of first officers.* The officers elected at the first election held under this Constitution shall hold their offices for the terms prescribed for them respectively, next ensuing after the next regular election for members of the General Assembly. But their terms shall begin upon the approval of this constitution by the Congress of the United States.

SEC. 27. *Jurisdiction of justices of the peace.* The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars. When an issue of fact shall be joined before a justice, on demand of either party thereto he shall cause a jury of six men to be summoned, who shall try the same. The party against whom the judgment shall be rendered in any civil action may appeal to the Superior Court from the same. In all cases of a criminal nature the party against whom the judgment is given may appeal to the Superior Court, where the matter shall be heard anew. In all cases brought before a justice, he shall make a record of the proceedings, and file the same with the clerk of the Superior Court for his county.

**In General.**—While under the provisions of the Constitution of 1868, this section, the courts of the justice of the peace were given "exclusive original" jurisdiction in matters founded on contract when the amount involved did not exceed two hundred dollars, etc., the Convention of 1875 removed the restriction of legislative powers as to the jurisdiction of the Superior Court by eliminating the words "exclusive original" relating to the powers of justices courts. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

The constitutional restriction imposed by the Constitution on the jurisdiction of justices of the peace to fines of \$50 and imprisonment for thirty days, this section, applies only to the administration of the law in the trial of criminal cases, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business and maintain a proper respect for their authority, and in this interpretation weight is given to a like interpretation of our statute giving such courts power to punish by imprisonment not exceeding thirty days or a fine not exceeding \$250, or both, in the discretion of the court, it being the same given to the judges of the Superior Courts, and other courts of record, for like offenses. *C. S.*, 981, 983. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

**Proceedings in bastardy** for an allowance to be made to the woman are civil and not criminal, for the enforcement of police regulations, and *C. S.*, sec. 273, raising the jurisdiction of the justice of the peace to an amount not exceeding two hundred dollars, is not contrary to the provisions of this section. *Richardson v. Egerton*, 186 N. C. 291, 119 S. E. 487.



**When Title Involved.**—Mere allegation of defendant that title is in controversy will not oust justices' jurisdiction. The matter must appear from the evidence or admission of the parties. *Hahn v. Fletcher* (N. C.), 128 S. E. 326, 328.

In an action by a purchaser of land with warranty to recover a sum of money paid by him to free the land from a lien, the deed would be introduced to prove the covenants, the title to real estate would be involved and a justice would not have jurisdiction. *Hahn v. Fletcher* (N. C.), 128 S. E. 326.

**Action to Enforce Lien on Lands in Drainage District.**—This section of our State Constitution, by limiting the jurisdiction of justices of the peace to the sum of two hundred dollars in civil actions founded on contract, and in other civil actions to fifty dollars, value of property, deprives the Legislature of the authority to confer on justices' courts jurisdiction in actions to enforce a lien upon lands for assessment for benefits to the lands in a drainage district, such proceedings being against the land alone as the debtor, and there being no contractual relations between the owner and the drainage district formed under the statute, ch. 96. Public Laws of 1919; and the justice's court being excluded from exercising jurisdiction of this subject-matter, none can be acquired thereof by the Superior Court on appeal therefrom. *Lower Creek Drainage Comm'rs v. Sparks*, 179 N. C. 581, 103 S. E. 142.

SEC. 28. *Vacancies in office of justices.* When the office of justice of the peace shall become vacant otherwise than by expiration of the term, and in case of a failure by the voters of any district to elect, the clerk of the Superior Court for the county shall appoint to fill the vacancy for the unexpired term.

SEC. 29. *Vacancies in office of Superior Court clerk.* In case the office of clerk of a Superior Court for a county shall become vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of the Superior Court for the county shall appoint to fill the vacancy until an election can be regularly held.

SEC. 30. *Officers of other courts inferior to Supreme Court.* In case the General Assembly shall establish other courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years.

SEC. 31. *Removal of judges of the various courts for inability.* Any judge of the Supreme Court, or of the Superior Courts, and the presiding officers of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability, upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon.

SEC. 32. *Removal of clerks of the various courts for inability.* Any clerk of the Supreme Court, or of the Superior Courts, or

of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability; the clerk of the Supreme Court by the judges of said court, the clerks of the Superior Courts by the judge riding the district, and the clerks of such courts inferior to the Supreme Court as may be established by law by the presiding officers of said courts. The clerk against whom proceedings are instituted shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least ten days before the day appointed to act thereon, and the clerk shall be entitled to an appeal to the next term of the Superior Court, and thence to the Supreme Court, as provided in other cases of appeals.

SEC. 33. *Amendments not to vacate existing offices.* The amendments made to the Constitution of North Carolina by this convention shall not have the effect to vacate any office or term of office now existing under the Constitution of the State, and filled, or held, by virtue of any election or appointment under the said Constitution, and the laws of the State made in pursuance thereof.

## ARTICLE V

### REVENUE AND TAXATION

SECTION 1. *Capitation tax; exemptions.* The General Assembly may levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which said tax shall not exceed two dollars, and cities and towns may levy a capitation tax which shall not exceed one dollar. No other capitation tax shall be levied. The commissioners of the several counties and of the cities and towns may exempt from the capitation tax any special cases on account of poverty or infirmity.

See notes under Art. VI, § 18; Art. II, § 29.

**Effect of Amendment of 1920.**—The constitutional amendment of 1920 will not have the effect of relating back and invalidating taxation on the polls in a school district which had met the constitutional requirement before the amendment had become the law; for such would have the effect of impairing vested rights existing under a valid contract. *Board of Education v. Bray Bros. Co.*, 184 N. C. 484, 115 S. E. 47.

Since the constitutional amendment of 1920, a tax by a school district upon the poll with the property tax, under a statute authorizing it, is unconstitutional as to the poll tax, and where the property tax is legal and valid, the taxation upon the poll will be eliminated, and the valid part upheld by the courts. On this appeal the cost is taxed equally between the parties. *Burney v. Commissioners*, 184 N. C. 274, 114 S. E. 298.

Since the adoption of the constitutional amendment of 1920, a special school district may not impose a tax upon the polls for school purposes; and where a poll tax and a property tax have both been favorably voted for at an election held for the purpose, the tax upon the poll will be held unconstitutional and the property tax upheld by the courts. *Board of Education v. Bray Bros. Co.*, 184 N. C. 484, 115 S. E. 47.

A statute allowing an existing consolidated school district to submit the question of taxation and the issue of bonds for school purposes to the district is not prohibited by this section or the amendments of 1920 to the



State Constitution, as to general legislation upon local or private affairs in "establishing or changing the lines of school districts"; and the Legislature, having the authority to enact a law of this character, when an election has been held approving this proposition, even if without warrant of law, may cure the defect by subsequent ratification and confirm the results of the election previously held. *Burney v. Commissioners*, 184 N. C. 274, 114 S. E. 298.

**Purchasers of State or Municipal Bonds.**—The substitution of a new section for Art V, sec. 1, of the State's Constitution by the amendment of 1920, eliminating the proportion between property and poll tax, does not interfere with the rights theretofore acquired by the purchasers of State or municipal bonds. *Hammonds v. McRae*, 182 N. C. 747, 110 S. E. 102.

**Issuance of School Bonds.**—Where the question of the issuance of school bonds by a special school district has been authorized by statute to be submitted to the electorate of the district, observing the equation between the property and poll tax as formerly required by our Constitution, this section and since the recent amendment of 1920, the proper authorities have submitted the question to the electorate, without observing the equation, this amendment or substitution is self-executing and has the effect of repealing the statutory requirement of equalization, as required by the former organic law; and the action of the proper authorities in eliminating that part of the statutory requirement, does not affect the validity of the issue. *Hammond v. McRae*, 182 N. C. 747, 110 S. E. 102. See note of cases under Art. VII, sec. 7.

**SEC. 2. *Application of proceeds of State and county capitation tax.*** The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent thereof be appropriated to the latter purpose.

**Not Available for Roads.**—In *Ballou v. Road Commission*, 182 N. C. 473, 475, 109 S. E. 628 it is said, in considering the validity of ch. 467 Public Local Laws of 1919: "Clark C. J. concurs entirely in all that is said in the opinion of the Court. But to 'exclude a conclusion,' thinks proper, as the statute is before us for construction, to call attention to the fact that so much of this statute as authorizes the levy of any tax on the poll for the payment of bonds issued 'for the construction and maintenance of roads' is invalid, because in violation of an explicit provision in the Constitution, which, as adopted in 1868, provides (Art. V. sec. 2): 'The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than 25 per cent thereof be appropriated to the latter purpose.' This provision of the Constitution remains unaltered. When there has been a levy authorized for general purposes the validity of the poll tax is not necessarily brought in question because when collected presumably the proceeds of the poll tax will be applied to the constitutional purposes to which it is restricted, i. e., 'education and the poor.' But the act before us is restricted to the specific purpose therein stressed, that the whole of the tax levied is to be applied solely in the construction and maintenance of the roads. So much of the act as levies a poll tax for that purpose is therefore unconstitutional and invalid. This, however, can be struck from the act without impairing the validity of the property tax as has been held in several cases."

**SEC. 3. *Taxation shall be by uniform rule and ad valorem; exemptions.*** Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, all real and personal property, according to its true value in money: Provided, notes, mortgages,

and all other evidences of indebtedness or any renewal thereof, given in good faith to build, repair, or purchase a home, when said loan does not exceed eight thousand dollars (\$8,000), and said notes and mortgages and other evidences of indebtedness, or any renewal thereof, shall be made to run for not less than one nor more than thirty-three years, shall be exempt from taxation of every kind for fifty per cent of the value of the notes and mortgages; Provided, the holder of said note or notes must reside in the county where the land lies and there list it for taxation: Provided further, that when said notes and mortgages are held and taxed in the county where the home is situated, then the owner of the home shall be exempt from taxation of every kind for fifty per cent of the value of said notes and mortgages. The word "home" is defined to mean lands, whether consisting of a building lot or larger tract, together with all the buildings and outbuildings which the owner in good faith intends to use as a dwelling place for himself or herself, which shall be conclusively established by the actual use and occupancy of such premises as a dwelling place of the purchaser or owner for a period of three months. The General Assembly may also tax trades, professions, franchises, and incomes: Provided, the rate of tax on incomes shall not in any case exceed six per cent (6%), and there shall be allowed the following exemptions, to be deducted from the amount of annual incomes, to-wit: for married man with a wife living with him, or to a widow or widower having minor child or children, natural or adopted, not less than \$2,000; to all other persons not less than \$1,000, and there may be allowed other deductions (not including living expenses) so that only net incomes are taxed.

See notes of *Gastonia v. Cloninger*, 187 N. C. 765, under Art. 7, § 9.

See note of *Carstarphen v. Town of Plymouth*, 186 N. C. 90, under § 7986.

**Liability of Shareholder.**—This section of our State Constitution requires legislative enactment for the levy of taxes, and objection to a statute that requires corporations to pay the taxes on every element of value that goes to make up their taxable assets, and specifically excludes the payment of taxes upon the shares of stock by the individual owner is untenable, and mandamus to compel the State Tax Commissioner to enforce the payment of taxes by the individual owner on his shares, contrary to the provisions of the statute, will not lie. The relation of the shareholders to the corporation, as creditors, discussed by Adams, J. *Person v. Watts*, 184 N. C. 499, 115 S. E. 336.

**Difference in State and County Taxes of Corporations.**—The provisions of the laws of 1919, and those of 1920, requiring railroads and other like corporations to pay their State taxes within a shorter period than those to the counties, etc., is a uniform legislative classification applying equally to all within its terms and not objectionable as a discrimination or a denial of the equal protection of the laws prohibited by this section of our Constitution. *Norfolk Southern R. Co. v. Lacy*, 187 N. C. 615, 122 S. E. 763.

**Interference by Courts.**—The State Constitution vests exclusive authority in the Legislature to levy taxes, this section, which may not be interfered with by the courts, a coordinate part of the Government, when it is exercised within the constitutional restriction. Art. I, sec. 8 *Person v. Watts*, 184 N. C. 499, 115 S. E. 336.



SEC. 4. *Restrictions upon the increase of the public debt except in certain contingencies.* Except for refunding of valid bonded debt, and except to supply a casual deficit, or for suppressing invasions or insurrections, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State to an amount exceeding in the aggregate, including the then existing debt recognized by the State, and deducting sinking funds then on hand, and the par value of the stock in the Carolina Railroad Company and the Atlantic and North Carolina Railroad Company owned by the State, seven and one-half per cent of the assessed valuation of taxable property within the State as last fixed for taxation. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon.

**Art. IX Not Affected.**—This section of our State Constitution, prohibiting the General Assembly from “lending the credit of the state in aid of any person, association, or corporation, except to aid the completion of railroads unfinished at the time of the adoption of the Constitution, or in which the State has a direct pecuniary interest, unless by a vote of the people,” is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision; and cannot be construed to affect the mandatory provision of Article IX of the State Constitution as to the maintenance of a State-wide school system by legislative enactment. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612. See notes of this case under general note and the various sections of Art. IX.

**Sale of Bonds at Less Than Par.**—The following paragraphs are from the dissenting opinion of Clark C. J. in *Pennington v. Tarboro*, 180 N. C. 438, 105 S. E. 199. This case was decided on the same principles as *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187. This latter case, which is of course controlling will be found in the notes to Const. Art. VIII, § 1 and Art. I, § 7 of this supplement. Ed. Note.

In *Pennington v. Tarboro*, 180 N. C. 438, 439, 105 S. E. 199, it is said by Clark in the dissenting opinion, “It is well to recall, as stated by Judge Brown in his opinion in *Kornegay v. Goldsboro*, post, 441, that the policy of this State was clearly expressed in sec. 4 Art. V, of the Constitution, which provided that, ‘Until the bonds of the State shall be at par, the General Assembly shall have no power to contract new debts or pecuniary obligations in behalf of the State, except to supply a casual deficit, or for suppressing invasions or insurrections, unless it shall in the same bill levy a special tax to pay the interest annually.’” This was a very clear intimation that it will be contrary to public policy to sell the bonds of this State at less than par.

**Same—Purpose of Legislature.**—This section of Const. and the legislation enacted by the Legislature of 1917 in pursuance thereof, were intended to protect the taxpayers of all the municipalities if this State by forbidding the sale of their bonds at less than par. It is much to be deprecated that just now when we are on the eve of the issue of a flood of bonds for roads, schools, and other purposes (many, but not all, of which will be necessary) by the State, counties, and municipalities the protection intended and afforded by the above constitutional provision,

and the legislation thereunder, shall be held for naught by the bare majority of one vote in this Court. The amendment was long debated, and its purport as a protection to the taxpayers against financial combinations, which would force the sale of these bonds at less than par was well understood when it was adopted by the people at the polls. *Clark C. J. dissenting in Pennington v. Tarboro*, 180 N. C. 438, 439, 105 S. E. 199.

**SEC. 5. *Property exempt from taxation.*** Property belonging to the State or to municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers; libraries and scientific instruments, or any other personal property, to a value not exceeding three hundred dollars.

See note to *Carstarphen v. Plymouth*, 186 N. C. 90, 118 S. E. 905, under § 7986.

**Assessments for Streets.**—While local assessments against lands along the streets of a city for paving and improving the streets may be regarded as a species of tax, and the authority therefor is generally referred to the taxing power, they are not levied and collected as a contribution to the maintenance of the general government, but more particularly confer advantages or improvements on the lands assessed, and do not fall within the intent and meaning of this section of the State Constitution, or our statutes, C. S. 7768, 7901; and the city, in assessing private owners, must take into consideration any city property that abuts on the street improved. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

**SEC. 6. *Taxes levied for counties.*** The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: Provided further, the State tax shall not exceed five cents on the one hundred dollars value of property.

**Special Approval for Necessary Expenditures.**—This section, of the State Constitution, as amended, authorizes the Legislature to give special approval of taxation by a county for necessary expenditures by either a special or general statute. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534.

**Tax for Road Purposes.**—Authority may be given by the Legislature to a county to levy a special tax for road purposes upon the approval of its electors lawfully ascertained, to exceed the general tax limitation, by special or general acts. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755.

**The authority conferred by C. S. 3767-3772**, upon the board of county commissioners to build, repair, or alter its road and bridges in any way that may seem practicable, and issue bonds or borrow money and issue notes not to exceed actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily inconsistent with the amendment to this section of our State Constitution, excepting from the limitation of 15 cents on the \$100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act," the amendment only adding that the approval may be done



by "general act." *Norfolk Southern Railroad Co. v. McCartan*, 185 N. C. 201, 116 S. E. 731.

**Where Act Severable, Valid Part Effective.**—An act that attempts to authorize a county to supplement to any extent its fund for general county expenses by special tax beyond the limitation by this section of the Constitution, is to that extent unconstitutional and void; but where the valid portion of the act is distinctly severable from the invalid part, and may alone be enforced by the methods prescribed, without being affected by the invalid part, the entire statute will not be declared invalid by the courts. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534.

**SEC. 7. *Acts levying taxes shall state object, etc.*** Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

**Failure to State Special Object.**—The provisions of this section of our Constitution, does not extend to taxes levied by counties or incorporated cities or towns for general municipal purposes. *Cabe v. Board of Aldermen*, 185 N. C. 158, 116 S. E. 419.

Where the statute authorizes a county to impose a tax for necessary expenses, it is a delegation of the power to be exercised by the county as an agency for the State for the convenience of local administration, and the statute is not void in failing to state the special object to which it is to be applied, nor is the tax itself invalid if this constitutional requirement has been observed by the county authority in the imposition of the special tax. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534.

## ARTICLE VI

### SUFFRAGE AND ELIGIBILITY TO OFFICE

**SECTION 1. *Who may vote.*** Every male person born in the United States, and every male person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people in the State, except as herein otherwise provided.

**SEC. 2. *Qualifications of voters.*** He shall reside in the State of North Carolina for one year and in the precinct, ward, or other election district in which he offers to vote four months next preceding the election: Provided, that removal from one precinct, ward or other election district to another in the same county shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which he has removed until four months after such removal. No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law.

**Conviction of Crime.**—In a contested election case, a conviction of an offense under a local law prescribing punishment in the State's Prison, renders void the vote of the one so convicted, whether the indictment charged or failed to charge that the alleged offense was "feloniously" committed. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

Where the eligibility of a voter at a contested election depends upon

either a conviction under a local prohibition act or under the general act of 1908, now C. S., 411, the former prescribing the word "feloniously" selling spirituous liquor, etc., and the other not so prescribing it, a conclusion by the referee, approved by the court, that a charge in the indictment of the word "feloniously" was an election of the State to prosecute under the private act, and the failure of the use of this word, an election to prosecute under the general statute, was not error, the general statute expressly excepting from its provisions special or local acts relating to the subject. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

**Voting by Mail.**—The provisions of this section, of our State Constitution, and of section 3 of this article do not require that the elector shall cast his vote in person, and under our absentee voters law, he complies with the constitutional provisions that he shall offer to vote, when he transmits his vote to the registrar to be cast for him in accordance with the methods prescribed by the statutes. *Jenkins v. State Board*, 180 N. C. 169, 104 S. E. 346.

**Same—Protection against Fraud.**—Our statutes, Art. 8, ch. 95, Consolidated Statutes, as amended by ch. 322, Public Laws of 1919, give ample protection against fraud, and the statutes are not void as being in contravention of this section, of our State Constitution. *Jenkins v. State Board*, 180 N. C. 169, 104 S. E. 346.

**SEC. 3. *Voters to be registered.*** Every person offering to vote shall be at the time a legally registered voter as herein prescribed, and in the manner hereafter provided by law, and the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this article.

See notes to the section immediately preceding.

See note of *Preston v. Roberts*, 103 N. C. 62, 110 S. E. 586, under Art. 6, § 7.

**SEC. 4. *Qualification for registration.*** Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any State in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section two of this article.

**SEC. 5. *Indivisible plan; legislative intent.*** That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other, that the whole shall stand or fall together.

**SEC. 6. *Elections by people and General Assembly.*** All elec-



tions by the people shall be by ballot, and all elections by the General Assembly shall be *viva voce*.

See notes to Art. 6, § 2.

**How Elector May Vote.**—The provisions of this section of our State Constitution, making the distinction that the elector shall vote by ballot, and an election by the General Assembly shall be *viva voce*, gives, under our statute, the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. *Jenkins v. State Board*, 180 N. C. 169, 104 S. E. 346.

**SEC. 7. Eligibility to office; official oath.** Every voter in North Carolina, except as in this article disqualified, shall be eligible to office, but before entering upon the duties of the office he shall take and subscribe the following oath:

"I, ....., do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as ....., so help me, God."

**A woman is qualified to act as a notary public** since the adoption of the amendment to the Constitution of this State, Art. VI, § 4; and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when thereto deputed by the clerk of the Superior Court under the provisions of our statutes, C. S., 935, 3305. *Preston v. Roberts*, 183 N. C. 62, 110 S. E. 586.

**SEC. 8. Disqualification for office.** The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted or confessed their guilt on indictment pending, and whether sentenced or not, or under judgment suspended, of any treason or felony, or of any other crime for which the punishment may be imprisoned in the penitentiary, since becoming citizens of the United States, or of corruption, or malpractice in office, unless such person shall be restored to the rights of citizenship in a manner prescribed by law.

**Removal of Prosecuting Attorney.**—A prosecuting attorney is removable from office as a matter of law or legal inference upon findings of his willful misconduct or maladministration in office, supported by evidence. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174.

**SEC. 9. When this chapter operative.** That this amendment to the Constitution shall go into effect on the first day of July, nineteen hundred and two, if a majority of votes cast at the next general election shall be cast in favor of this suffrage amendment.

## ARTICLE VII

### MUNICIPAL CORPORATIONS

**SECTION 1. County officers.** In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the General Assembly, the following officers: A treasurer, register of deeds, surveyor, and five commissioners.

SEC. 2. *Duty of county commissioners.* It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes, and finances of the county, as may be prescribed by law. The register of deeds shall be ex officio clerk of the board of commissioners.

SEC. 3. *Counties to be divided into districts.* It shall be the duty of the commissioners first elected in each county to divide the same into convenient districts, to determine the boundaries and prescribe the name of the said districts, and to report the same to the General Assembly before the first day of January, 1869.

SEC. 4. *Townships have corporate powers.* Upon the approval of the reports provided for in the foregoing section of the General Assembly, the said districts shall have corporate powers for the necessary purposes of local government, and shall be known as townships.

SEC. 5. *Officers of townships.* In each township there shall be biennially elected, by the qualified voters thereof, a clerk and two justices of the peace, who shall constitute a board of trustees, and shall, under the supervisions of the county commissioners, have control of the taxes and finances, roads and bridges of the townships, as may be prescribed by law. The General Assembly may provide for the election of a larger number of justices of the peace in cities and towns, and in those townships in which cities and towns are situated. In every township there shall also be biennially elected a school committee, consisting of three persons, whose duty shall be prescribed by law.

SEC. 6. *Trustees shall assess property.* The township board of trustees shall assess the taxable property of their townships and make return to the county commissioners for revision, as may be prescribed by law. The clerk shall be, ex officio, treasurer of the township.

SEC. 7. *No debt or loan except by a majority of voters.* No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

**Chapter 722, Public Laws of 1915 Constitutional.**—The provisions of Article VIII, section 4, of our Constitution, relate to municipal corporations as originally formed under legislative enactment, and is more restrictive in limiting the municipality in contracting debts or pledging their credit than this section which requires an election by its voters to do so, when not for necessary expenses; and an exception to the constitutionality of chapter 722, Public Laws of 1915, cannot be sustained on the ground that it does not limit the amount of the bonds that may be issued for the purposes therein authorized. *Waters v. Board of Comm'rs*, 186 N. C. 719, 120 S. E. 450.

**Not Applicable to Art. 9.**—This section refers to debts and taxes in



furtherance of local measures, and does not extend to the provisions of Article IX, relating to a State-wide statutory measures to enable the various counties to maintain six-months terms of public schools, by borrowing and returning a State fund created for the purpose, and in accordance with the constitutional express recognition of the counties as the governmental units through which the general purpose may be effected. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612.

The principle upon which the incurring of debts, levying of taxes by counties, or other municipal corporations for public schools are not to be regarded as necessary expenses within the meaning of this section, of the Constitution, and requiring the submission of the question to and the approval of the voters before obligations of this kind are valid, relates to cities or towns or special school districts, or to the purpose of providing means for maintaining schools for a longer period than the constitutional term, or to some school in a special locality has no application to a State-wide school system created under a general act passed in pursuance of Article IX of the Constitution. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612.

**Relation to Sections 5473 and 5530.**—The authority given the county board of education to redistrict the entire county or part thereof, and to consolidate school districts, etc., C. S., 5473, as amended by Public Laws of 1921, ch. 179, providing, among other things, for such consolidation of existing districts under a uniform rate of taxation not exceeding the lowest in any one district, meets the requirements of this section of our Constitution, but to the extent the amendatory statute permits consolidation of local school tax districts with adjacent territory or local schools that have never voted any tax, the provisions of C. S., 5530, must apply so as to permit those living in such proposed new territory to vote separately upon the question of taxing themselves for the purpose. *Perry v. Commissioners*, 183 N. C. 387, 112 S. E. 6.

The combination or consolidation of local school tax districts with territory that has not voted a special tax for the purposes of schools must fall within the provisions of C. S., 5530, whereby the proposed new territory is required to vote separately upon the question of taxation, in conformity with this section of our Constitution. *Perry v. Commissioners*, 183 N. C. 387, 112 S. E. 6.

**Indebtedness of School District.**—A school district comes within the provisions of this section, requiring a majority vote of the qualified voters therein for it to "contract any debt, pledge its faith, or loan its credit," etc., except for necessary expenses. *Jones v. Board of Education*, 185 N. C. 303, 117 S. E. 37.

**Where Funds are Already on Hand.**—But this provision, has no application where, the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. *Adams v. Durham*, 189 N. C. 232, 126 S. E. 611, 612.

**Majority Required.**—The words used in our Constitution requiring "a majority of the qualified voters of the county" to pledge its credit, except for necessary expenses, have a well known meaning in the law, and accordingly a mere majority of the votes cast at the election is insufficient if not also a majority of the qualified electors of the county, whether they voted or not. *Long v. Commissioners*, 181 N. C. 146, 106 S. E. 481.

An issue of bonds for a school district will not be declared invalid because the special act under which they were approved by the voters did not expressly require for their validity that a majority of the qualified voters of the district must vote in their favor, when it appears that such majority, as ascertained from a valid registry, was cast in favor of the issue. *Hammond v. McRae*, 182 N. C. 747, 110 S. E. 102.

Under the legal presumption that an act passed by the Legislature is valid under the Constitution, an act requiring that the question of bonds be submitted to the voters of a school district, empowering the board of

trustees to issue bonds if a majority of the qualified voters at the election to be called for the purpose vote in favor thereof, nothing else appearing, requires for the validity of the bonds, a majority vote of the qualified electors of the district as ascertained by a valid registry. This section. *Hammond v. McRae*, 182 N. C. 747, 110 S. E. 102. See note of this case under Art. V, sec. 1.

**An act permitting a county to change its county-seat**, and to incur a debt for that purpose, submitting the question to the determination of a majority of the qualified voters thereof, must be approved under the provisions of this section of our Constitution, requiring that for a county, etc., to contract a debt, pledge its faith, or loan its credit, it shall be ascertained by a majority of the qualified voters (in the sense of electors) therein, and not merely by a majority of those voting, if a less number. *Long v. Commissioners*, 181 N. C. 146, 106 S. E. 481.

**Appropriation of Taxes by Chamber of Commerce.**—This section of our State Constitution, restricting the power of the Legislature from allowing counties, cities and towns to contract a debt, pledge its faith or loan its credit, or to levy or collect any tax except for the necessary expense thereof, is with reference to the county, city or town as a State governmental agency, and does not authorize an appropriation of a certain per cent of taxes levied upon their taxpayers for the use or disposition of a chamber of commerce of a city, without the approval of the qualified voters therein ascertained by an election duly held for that purpose. *Ketchie v. Hedrick*, 186 N. C. 392, 119 S. E. 767.

This section of our Constitution, requiring the approval of the electors to a proposition of pledging its faith or loaning its credit by municipalities, applies to taxing school districts, and the validity of the tax or bonds requiring their sanction is determined by a majority of the registered voters. *Davis v. County Board of Education*, 186 N. C. 227, 119 S. E. 372.

Where a special school district has included a floating debt previously incurred for school purposes, in an issuance of bonds for like purposes under an act authorizing the issuance of the bonds, approved by the electors of the district, though this is not for a necessary expense, Const., this section, the validity of the bonds may not be successfully assailed on that account, it being within the legislative authority to validate by ratification the indebtedness thus incurred, and this principle including ratification by the electorate. *Hammond v. McRae*, 182 N. C. 747, 110 S. E. 102.

**Special and Nonspecial Tax Territory Consolidated.**—Special school tax districts may be consolidated and their lines established within a county, where no special tax has been imposed, without the approval of the voters thereof; and where special tax and nonspecial tax territory have been consolidated, a statute which authorizes an additional tax for school purposes upon the approval of a majority of the qualified voters of the district so formed, the proceeds to be equalized among the special tax and nonspecial tax territory, without impairing the existing obligations of the former, does not come within the inhibition of our State Constitution, this section, as to agencies of the State Government pledging their faith, loaning their credit, or levying a tax, unless approved by a majority of the qualified voters, etc. *Coble v. Commissioners*, 184 N. C. 342, 114 S. E. 487.

Special school-tax districts, organized and exercising governmental functions in the administration of the school laws are quasi-public corporations subject to the constitutional provisions in restraint of contracting debts for other than necessary purposes, except by the vote of the people of a given district, Const., this section, and, semble, that where an existent tax and nontax district are thereunder consolidated, it would require the submission of the question to those living within the district thus formed, but outside of the district that has theretofore voted the tax. *Paschal v. Johnson*, 183 N. C. 129, 110 S. E. 841.

Where a school district has been consolidated with another having



valid authority to issue bonds for public school purposes, and levy a special tax therefor, and has complied with this section, of the Constitution as to the payment of its proportionate part, the bonds when issued will be a valid obligation upon both of the districts so consolidated. *School Committee v. Board of Education*, 186 N. C. 643, 120 S. E. 202.

**Estoppel to Question Validity of Special Tax.**—The Private Laws of 1903 created a school district coterminous with a city's limits or those which may thereafter be extended, giving the school authorities the power to permit children to go to the public schools who may reside outside of the corporate limits upon such terms as they may deem just and fair, and complied with the faith or credit clause contained in this section of our Constitution, under the provisions of the statute, by submitting to the voters of the district, at an election duly and regularly held, the question of a special school tax, which was approved by them. Under later statutes the limits were extended beyond those of the town without authorization for the vote of the special tax and no election was held; and for nineteen years a special tax was also levied and collected for the additional or outlying territory, without protest or legal action taken by the taxpayers. It was held that the voters' approval under the statute of 1903 was a sufficient compliance with the constitutional requirement; and the plaintiffs, in their action in behalf of themselves and other taxpayers, are estopped after nineteen years to question the constitutionality of the special tax levied and collected. *Carr v. Little*, 188 N. C. 100, 123 S. E. 625.

**Variance between Statutes Regard School Tax.**—A later statute, apparently in conflict with a former local one, will not be construed to repeal the local act for repugnancy when the two may be sustained by a reasonable interpretation to give effect to the legislative intent as gathered from the language employed; and where the school trustees, under the provisions of a later general act purporting to make uniform all general or local acts on the subject, have submitted the question of a special school tax or bond issue to the voters of a school district, and approved by them under the provisions of this section of our Constitution, and the former local statute has also authorized the submission of this question to the voters: Held, construing the statutes in *pari materia*, a variance between them, with reference to the referendum and the body that issues the bonds, is immaterial and is a substantial compliance with the organic law. *Carr v. Little*, 188 N. C. 100, 123 S. E. 625.

**What are "Necessary Expenses."**—The term, in the Constitution, "necessary expenses" is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. It has been held in this jurisdiction that streets, waterworks, sewerage, electric lights, fire department and system, municipal building, market house, jail or guard house are necessary expenses. *Storm v. Wrightsville Beach (N. C.)*, 128 S. E. 17, 18.

The question, What is a necessary expense? is a judicial one for the courts to determine, and cannot be defined generally so as to fit all cases which may arise in the future. As we progress, we look for better moral and material conditions and the governmental machinery to provide them. "Better access to the good things of life for all people," safety, health, comfort, conveniences in the given locality. Webster defines "necessary:"

"A thing that is necessary or indispensable to some purpose; something that one cannot do without; a requisite; an essential."

What is a necessary expense for one locality may not be a necessary expense for another. *Storm v. Wrightsville Beach (N. C.)*, 128 S. E. 17, 18.

**Same—Streets and Sidewalks.**—As streets are a necessary expense, it naturally follows that sidewalks are. *Storm v. Wrightsville Beach (N. C.)*, 128 S. E. 17, 18.

The borrowing of money by an incorporated city or town for street paving or improvements is for a necessary expense, and does not fall within the provisions of this section of the State Constitution requiring

that in order for the municipality to pledge its faith or lend its credit, the proposition must have the approval of a majority of the qualified voters. *Brown v. Hillsboro*, 185 N. C. 368, 117 S. E. 41.

**Same—Bridges—County Homes.**—The building of bridges on the public roads, and county homes, and their maintenance, are necessary expenses of the county, under the provisions of Article VII, this section, State Constitution. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534.

**Same—Same—Interstate Bridges.**—Our statutes are constitutional and valid, authorizing the county commissioners of any county bordering on another State to pay the proportion of the cost of building any bridge spanning a river where it is the State line, including cost of approaches, and to issue bonds to raise money to pay the same; and the objection that the building of the bridge is not a necessary county expense, and may require the county to pay more than it should for that part of the bridge and approaches that lie within the county, is untenable. *Emery v. Commissioners*, 181 N. C. 420, 107 S. E. 443.

**Same—Schoolhouses.**—The building and maintenance of schoolhouses by a school district is not for necessary expenses within the meaning of this section. *Jones v. Board of Education*, 185 N. C. 303, 117 S. E. 37.

**Same—Six-months School Term.**—When necessary to maintain the six-months term of public schools required by the Constitution, Art. IX, it is within the legislative authority in establishing its State-wide system to assume an indebtedness of a school district therefor, including the cost of necessary buildings, and direct that it be provided for by the respective counties as administrative units of the public-school system of the State; and it is not required, in this instance, that the question of taxation for the purpose be submitted to the voters of the territory, under the provisions this section of the Constitution. *Lovelace v. Pratt*, 187 N. C. 686, 122 S. E. 661.

**Same—Public Roads.**—The building and maintenance of public roads of a county is a necessary county expense, and being authorized by statute the question is not required by the Constitution to be submitted to the voters for approval. Const., Art. VII, this section, C. S., 1297 (18), (19); C. S. 1325. *Lassiter v. Board of Commissioners*, 188 N. C. 379, 124 S. E. 738.

**Same—Jetties.**—The governing body of the municipality determined the need of jetties. No fraud or abuse of discretion being shown, we think, under the facts and circumstances of this case, that they are a necessary expense. *Storm v. Wrightsville Beach* (N. C.), 128 S. E. 17, 19.

**Same—Incinerator.**—An incinerator for the destruction of garbage in a town, of all things, especially a town on a beach that functions mostly in the summer, is a necessary expense. *Storm v. Wrightsville Beach* (N. C.), 128 S. E. 17, 19.

**Same—Sewerage.**—Where, under the provisions of a statute to establish a county-wide system of sewerage according to districts, a district has been established and its lines defined, it was held that sewerage as contemplated by the act is a necessary county expense, and bonds may be issued for the purposes of the district without submitting the question of their issuance to the voters of the district. *Reed v. Howerton Engineering Co.*, 188 N. C. 39, 123 S. E. 479.

SEC. 8. *No money drawn except by law.* No money shall be drawn from any county or township treasury, except by authority of law.

SEC. 9. *Taxes to be ad valorem.* All taxes levied by any county, city, town, or township shall be uniform and ad valorem



upon all property in the same, except property exempted by this Constitution.

**Taxation by Independent School District.**—Where a city has created debts in view of a bond issue for its public schools, within its corporate limits, under the provisions of the Municipal Finance Act, and thereafter by a local public statute the limits of the city are enlarged, but recognizing the independent school district, within the old limits, and having previously issued part of the bonds, proceeds to issue more of them to meet the obligations already incurred before the enactment of the local statute, its proposed action is not contrary to the provisions of this section of our Constitution, as the authority previously conferred imports a liability to taxation; and the further issuance of the bonds may not be enjoined at the suit of a taxpayer. *Duffy v. Greensboro*, 186 N. C. 470, 120 S. E. 53.

**Assessment for Paving Street.**—It is required by the Constitution, Art. V., sec. 3 that property shall be taxed by a uniform rule; and by Art. VII, this section that all taxes levied by any county, city, or town, etc., shall be uniform and ad valorem upon all property in the same, except property exempt by the Constitution; and while assessments on lands abutting on streets improved are not required to be uniform with all other subjects of taxation, in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements. *City of Gastonia v. Cloninger*, 187 N. C. 765, 123 S. E. 76.

Where a county has, upon previous agreement with a city or incorporated town, paid a proportionate part of the cost of paving a certain street within the city, and the city has paid the balance, each respectively, out of its general funds, the owners of land abutting on this street cannot maintain the position that from the assessment of their land abutting on the street improved there should proportionately be deducted the amount paid by the county, the same being contrary to the constitutional requirement for the uniformity of taxation in the same class or subject-matter. *City of Gastonia v. Cloninger*, 187 N. C. 765, 123 S. E. 76.

SEC. 10. *When officers enter on duty.* The county officers first elected under the provisions of this article shall enter upon their duties ten days after the approval of this Constitution by the Congress of the United States.

SEC. 11. *Governor to appoint justices.* The Governor shall appoint a sufficient number of justices of the peace in each county, who shall hold their places until sections four, five, and six of this article shall have been carried into effect.

SEC. 12. *Charters to remain in force until legally changed.* All charters, ordinances, and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this Constitution.

**Contracts of City with Public Service Corporation.**—In *Corporation Commission v. Henderson Water Co.* (N. C.), 128 S. E. 465, 466 the Court said: "The power conferred by its charter upon the city of Henderson to provide water and lights, and to contract for same, provide for cleansing and repairing the streets, regulate the market, take proper means to prevent and extinguish fires, is subject to the police power of the state, with respect to rates to be charged under such contracts as the city may make under its charter with a public service corporation."

SEC. 13. *Debts in aid of the rebellion not to be paid.* No county, city, town, or other municipal corporation shall assume to pay, nor shall any tax be levied or collected for the payment of

any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of the rebellion.

**SEC. 14. Powers of General Assembly over municipal corporations.** The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine, and thirteen.

**County Treasurer.—Section 1389.**—This section of our Constitution should be construed with reference to other sections therein, with certain specified exceptions not relevant to this case, and thereunder the Legislature is given full power to modify, change, or abrogate any and all provisions thereof and substitute others in their place; and though section 1 provides in terms that for the ordinary purposes of general county government there shall be elected a county treasurer, etc., it is yet within the legislative authority to so modify this requirement that it may delegate to the county commissioners the authority to abolish the position of county treasurer and appoint a bank or banks to act in this capacity for the consideration only which may arise to them from a deposit therein of the taxes collected; and C. S., 1389, is constitutional and valid. *Tyrrell v. Holloway*, 182 N. C. 64, 108 S. E. 337.

## ARTICLE VIII

### CORPORATIONS OTHER THAN MUNICIPAL

**SECTION 1. Corporations under general laws.** No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation.

**In General.**—This section should be construed in connection with § 2, dealing with "duties from corporations" and § 3, defining corporations as including "associations and joint stock companies." *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187.

The legislative intent was to leave it to the discretion of the Legislature to enact special acts as the needs of municipal corporations may require, with the reservation as to changing the names; and the positive restriction as to "local, private, or special acts," applies to business corporations. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187.

**Applicable Unless Vested Rights Impaired.**—The provision of this section, of the State Constitution, affecting the organization of corporations, and specially providing that all "such laws or special acts may be altered from time to time or repealed," etc., enters into every charter taken out or corporation formed thereunder, and any such corporation may not complain when a statutory repeal or amendment has been made, on the ground that it works a hardship on it or impairs the value of its property, unless vested rights have been prior acquired by it which have been impaired or destroyed by the repealing or amendatory act complained of. *Elizabeth City Water etc., Co. v. Elizabeth City*, 188 N. C. 124 S. E. 611, 278.



**Sale and Transfer of Stock.**—In *Wright v. Iredell Tele. Co.*, 182 N. C. 308, 313, 108 S. E. 744, it is said: We have found no statute in the laws of this State forbidding restrictions and limitations in the sale and transfer of stock in corporations, and it would seem that where the Legislature, in the exercise of its constitutional grant, or reservation (Art. VII, sec. 1, Const.), has authorized the Secretary of State to issue certificates of incorporation and approve the application for charters, the provisions of such charters, not inconsistent with the legislative policy and so approved by the Secretary of State have, at least the force and effect of a valid agreement and binding as between the stockholders who take with notice of such provisions.

**An Act which relates to all municipal corporations of a county**, including cities, towns, townships, and school districts, is not a "special act" within the intent and meaning of this section of our State Constitution. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187.

**Establishment of School Districts.**—The establishing a school district relates to public municipal corporations, which may be done by special legislative enactment under Art. VII of our Constitution, entitled "Municipal Corporations," and it is not prohibited by this section thereof, relating to "corporations other than municipal;" and a special act creating a school district or amending an existing one, providing for the election of trustees to manage its affairs, and for bonds and taxation relating thereto, is not in contravention of our Constitution, when properly passed upon an "aye" or "no" vote. *Dickson v. Brewer*, 180 N. C. 403, 104 S. E. 887.

The principal that, under the recent amendments to our Constitution, the Legislature may authorize counties and cities, etc., to issue bonds to provide necessary revenue for their proper governmental purposes, refers only to such as come under the amendments to this section, of our Constitution, or such as have a valid existence, and not to school districts sought to be established under an act prohibited by our present Constitution, Art. II, sec. 29. *Board v. Mutual Loan, etc., Co.*, 181 N. C. 306, 107 S. E. 130.

**Public or Quasi-Public Corporations.**—This section, of our State Constitution refers to private or business corporations, and not to public or quasi-public corporations acting as governmental agencies, such as cities, counties, towns, and the like. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187.

**A turnpike company** having powers under its charter, and also under a special act of the Legislature, acquired from the county commissioners a lease for fifty years to a certain length of a public road, to be used as a part of its turnpike road, with the right to place one or more toll gates thereon, before the recent adoption of the amendments to our State Constitution, and improved the same by the expenditure of large sums of money: It was held, that an act of the Legislature, passed since the adoption of the constitutional amendment, that prohibited the turnpike corporation from continuing the existence of a toll gate at or near a certain terminus of its road, necessary to the full enjoyment of the returns therefrom, and permitting a part thereof to be used toll free, is invalid under this section, of the Constitution as amended, which requires that the General Assembly shall provide by general laws for amending, etc., charters of all corporations, expressly stating turnpike companies, and excluding them from the exceptions to the general law. *Watts v. Lenoir, etc., Turnpike Co.*, 181 N. C. 129, 106 S. E. 497.

The recent amendment to our Constitution, by substituting a new section for Art. VIII, sec. 1, prohibiting the Legislature, with certain exceptions, from creating or amending the charters of corporations, by special act, but requiring this to be done under a general law, renders invalid a later special act of the Legislature, attempting to amend the charter of a turnpike corporation, affecting rights theretofore acquired, and also acquired under special statutes, enacted before the adoption of the con-

stitutional amendments. *Watts v. Lenoir, etc., Turnpike Co.*, 181 N. C. 129, 106 S. E. 497.

SEC. 2. *Debts of corporations, how secured.* Dues from corporations shall be secured by such individual liabilities of the corporations, and other means, as may be prescribed by law.

See notes of *Kornegay v. Goldsboro*, 180 N. C. 441, under the section, immediately preceding.

SEC. 3. *What corporations shall include.* The term "Corporation," as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.

See notes of *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187, under Art. 8, § 1.

SEC. 4. *Legislature to provide for organizing cities, towns, etc.* It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporation.

**In General.**—If this section (properly belonging in Art. VII) included corporations as governmental agencies, it would be meaningless. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187.

**Special Act Not Prohibited.**—This section does not prohibit a special act of the legislature providing that a town may levy special assessments without the petition required by § 2706, and validating assessments so levied. *Halton v. Mocksville*, 189 N. C. 144, 126 S. E. 326.

**A school district** is not within the purview of this section of our Constitution, restricting the power of cities, towns, and incorporated villages, as to taxation, assessment, borrowing money, contracting debts, loaning their credit, etc. *Felmet v. Comm'rs*, 186 N. C. 251, 119 S. E. 353.

**Chapter 722, Public Laws 1915.**—The provisions of this section, of our Constitution, relate to municipal corporations as originally formed under legislative enactment, and is more restrictive in limiting the municipality in contracting debts or pledging its credit than Article VII, section 7, which requires an election by its voters to do so, when not for necessary expenses; and an exception to the constitutionality of chapter 722, Public Laws of 1915, cannot be sustained on the ground that it does not limit the amount of the bonds that may be issued for the purposes therein authorized. *Waters v. Board of Comm'rs*, 186 N. C. 719, 120 S. E. 450.

## ARTICLE IX

### EDUCATION

#### General Note.

**Chapter 147, Laws of 1921**, passed under the provisions of this Article 410 of our State Constitution, with a view of providing a special building fund to enable the counties of the State to properly maintain a six-months school term, authorizing and directing the State Treasurer to issue \$5,000,000 coupon bonds of the State, sell the same, and from the proceeds advance to the several counties of the State a proportionate amount from



time to time for the purpose of enabling such counties to acquire sites, and to provide buildings, equipping, repairing the public school buildings, etc., adequate and necessary to maintain a six-months school, is for the maintenance of a State-wide school system required of the State Government and imposed as a primary duty on the State itself by express provision of the Constitution. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612. See notes of this case under Art. IX, § 4.

**Supervision of Court in Certain Cases.**—While it is held that chapter 147, Laws of 1921, providing for a bond issue to aid the counties in building and equipping the schoolhouses necessary for the accommodation of the pupils for a six-months term of school, is a reasonable and valid exercise of the legislative power under this Article of the Constitution, emphasized by C. S., 5758 et seq., passed in pursuance of section 15 thereof, making it an indictable offense where there is a willful failure to attend the public schools, the principle announced does not withdraw from the scrutiny or control of the court cases where the exercise of the legislative authority has been arbitrary and without limit as to the amount; or where the school authorities depart from any and all sense of proportion and enter on a system of extravagant expenditure, clearly amounting to manifest abuse of the powers conferred. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612.

**SECTION 1.** *Education shall be encouraged.* Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

**The provisions of our Constitution**, Art. IX, secs. 1, 2, 3, are mandatory that the Legislature provide by "taxation and otherwise for a general and uniform system of public education, free of charge, to all of the children of the State from six to twenty-one years," etc., and for the continuance of the school term in the various districts for at least six months in each and every year, recognizing the counties of the State and designating them as the governmental agencies through which the Legislature may act in the performance of this duty and in making its measure effective. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612.

**SEC. 2.** *General Assembly shall provide for schools; separation of the races.* The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of either race.

See note section immediately preceding.

**Race Discrimination.**—It was held, on appeal, that there was no evidence to sustain an allegation that the constitutional inhibition against race discrimination in the distribution and use of the public school funds had been violated. *Galloway v. Board*, 184 N. C. 245, 114 S. E. 165.

A school district, made under the provisions of a private statute coterminous with the limits of a city, vesting in a school committee appointed under Public Laws of 1899, ch. 732, sec. 76, the sole control of the public schools of the city, by reference to a school district for each race is not a violation of this section of our State Constitution, as a discrimination between the races, when by proper interpretation it appears that the intent of the statute was to define the boundaries of a district where the races were to attend separate schools, without discrimination in the apportionment of the proceeds of the bonds, or school facilities; and the sale

of the bonds may not be enjoined on that account. *Story v. Board*, 184 N. C. 336, 114 S. E. 493.

SEC. 3. *Counties to be divided into districts.* Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment.

See note to Art. 9, § 1.

**Attempt to Form High School District.**—Our statutes providing that the county board of education shall divide the townships, or the entire county, etc., into convenient school districts, etc., C. S., 5469, and authorizing and empowering the board to redistrict the entire county and consolidate school districts, etc., C. S., 5473, was passed in pursuance of this section, of the State Constitution, and refers to the establishment, consolidation, etc., of districts in the sense of territorial or geographical regions, and not to the dividing or segregation of the pupils; and an attempt of the county board of education thereunder to form a high school district in a territory comprised of several public school districts, is without authority and invalid. As to whether this may be done under the Public Laws of 1921, ch. 179, is neither before the Court nor decided on this appeal. *Woosley v. Commissioners of Davidson County*, 182 N. C. 429, 109 S. E. 369. See notes of this case under Const. Art. II, sec. 29.

**Mandamus to Compel Levy of Tax.**—Where, in proceedings for a mandamus by the county board of education, a county has been ordered to levy a tax for a six months term of its public schools, in excess of that limited for the purpose by statute, it does not appear whether the plaintiff has apportioned to the county the amount it was entitled to receive under the statute; and if so, whether it was sufficient for a six months term required by this section, of the State Constitution, the case will be remanded for further findings in order to properly present the question for the determination of the Supreme Court whether mandamus would lie. *Board v. Board*, 182 N. C. 571, 109 S. E. 630.

Where a county has levied the full amount of the taxes limited by sec. 4, ch. 146, Public Laws of 1921, it is required by the statute that "it shall receive from the State public school fund for teachers' salaries an apportionment sufficient to bring the school term in every school district to six months;" and where it does not appear that the State Board has acted accordingly in making this apportionment, but has instituted a proceeding to compel by mandamus a county to levy an excess of the statutory limitation, the imperative necessity that it should be done in order to meet the requirements of a six months school provided by this section, of the State Constitution does not arise for the determination of the Court. *Board v. Board*, 182 N. C. 571, 109 S. E. 630.

SEC. 4. *What property devoted to educational purposes.* The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also all moneys, stocks, bonds, and other property now belonging to any State fund for purposes of education; also the net proceeds of all sales of the swamp lands belonging to the State, and all other grants, gifts or devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State, or by the terms of the grant, gift, or devise, shall be paid into the State treasury, and, together with so much of the ordinary revenue of the State as may be by law



set apart for that purpose, shall be faithfully appropriated for establishing and maintaining in this State a system of free public schools and for no other uses or purposes whatsoever.

SEC. 5. *County school fund; proviso.* All moneys, stocks, bonds, and other property belonging to a county school fund; also the net proceeds from the sale of estrays; also the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws of the State; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of the State: Provided, that the amount collected in each county shall be annually reported to the Superintendent of Public Instruction.

SEC. 6. *Election of trustees, and provisions for maintenance, of University.* The General Assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen, shall be vested all the privileges, rights, franchises, and endowments thereof in anywise granted to or conferred upon the trustees of said University; and the General Assembly may make such provisions, laws, and regulations from time to time as may be necessary and expedient for the maintenance and management of said University.

SEC. 7. *Benefits of the University.* The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has heretofore accrued to the State, or shall hereafter accrue, from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University.

**Income from Escheats.**—The University of North Carolina, under its charter, since confirmed by this section of our state Constitution, and now embraced in C. S., 5784-5-6, has the right by escheat to the property of a decedent, who has died intestate, leaving no one else to whom it would go under our statutes of descent and distribution. In re Neal, 182 N. C. 405, 109 S. E. 70.

SEC. 8. *Board of Education.* The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Instruction, and Attorney-General shall constitute a State Board of Education.

SEC. 9. *President and secretary.* The Governor shall be president and the Superintendent of Public Instruction shall be secretary of the Board of Education.

SEC. 10. *Powers of the board.* The Board of Education shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but

all acts, rules, and regulations of said board may be altered, amended, or repealed by the General Assembly, and when so altered, amended, or repealed they shall not be reenacted by the board.

SEC. 11. *First session of the board.* The first session of the Board of Education shall be held at the capital of the State within fifteen days after the organization of the State government under this Constitution; the time of future meetings may be determined by the board.

SEC. 12. *Quorum.* A majority of the board shall constitute a quorum for the transaction of business.

SEC. 13. *Expenses.* The contingent expenses of the board shall be provided by the General Assembly.

SEC. 14. *Agricultural department.* As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain, in connection with the University, a department of agriculture, of mechanics, of mining, and of normal instruction.

SEC. 15. *Children must attend school.* The General Assembly is hereby empowered to enact that every child, of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means.

## ARTICLE X

### HOMESTEADS AND EXEMPTIONS

SECTION 1. *Exemptions of personal property.* The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any debt.

**Husband's Duty of Support.**—The marriage relation, spoken of as a civil contract, is more than an ordinary business contract in that the marriage confers certain other privileges and imposes certain other duties upon the parties as between themselves and in their relation to society, among them being the husband's duty to protect and provide for his wife; and this is more than a debt, in its ordinary sense, and not merely such an one as exists in the ordinary acceptance of the word, or within the contemplation of our Constitution, these sections allowing to the creditor his homestead or personal property exemptions therefrom. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

SEC. 2. *Homestead.* Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town, or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or



other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises.

**Lands Held By Entireties.**—A homestead in lands held by the husband and wife by entireties may not be claimed against a judgment rendered on their joint obligation given for the purchase of the lands so held by them, Const., Art. X, this section, and the same rule applies as to mechanics' or laborers' liens, etc., under constitutional provision, but not as to liens for materials furnished, etc., which rest by statute alone. *Johnson v. Leavitt*, 188 N. C. 682, 125 S. E. 490.

**SEC. 3. *Homestead exemption from debt.*** The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any of them.

**SEC. 4. *Laborer's lien.*** The provisions of sections one and two of this article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises.

**In General.**—A debtor may not claim his homestead (Const., Art. X, sec. 4) against the lien of a judgment in favor of the furnishers of material, etc.; and were it otherwise, he must claim it in apt time or he will be deemed to have waived it; and this right being personal to him, it cannot be asserted by his creditors. *Sugg v. Pollard*, 184 N. C. 494, 115 S. E. 153.

**SEC. 5. *Benefit of widow.*** If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right.

**SEC. 6. *Property of married women secured to them.*** The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried.

**In General.**—The common-law rule giving to the husband the actual or potential ownership of the separate choses in action belonging to his wife by reducing them into possession is now changed by the Constitution of 1868, State Const., this section, giving to the wife the sole ownership of her separate estate. *Turlington v. Lucas*, 186 N. C. 283, 119 S. E. 366.

**Actions for Torts.**—*Hipp v. Dupont*, 182 N. C. 9, 108 S. E. 318, it was said: "It follows therefore that the husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. We agree with the learned counsel for the plaintiff that if the husband could maintain an action to recover damages for torts on the wife she would be able to maintain an action on account of torts sustained by the husband. Such right of action if it existed in favor of the husband should exist in favor of the wife. It should be in

favor of both, or neither, but in view of the constitution of 1868 and our statute on the subject, we think that such action cannot be maintained by either on account of the injury to the other."

**Sale of Estate by Entireties.**—*Martin v. Lewis*, 187 N. C. 473, 476, 122 S. E. 180, it is said: "The estate by entireties was not created, either in England or in this State, by any statute, and it has been contended that it was abolished by our statute in 1784, now C. S., 1735, converting all joint estates into tenancy in common, and still more so by the constitutional change, conferring upon a married woman the same rights in her property "as if she had remained single." By reason of similar statutes, or statutes especially repealing the estate by entireties, that anomalous estate has disappeared in all but a very few States in this country, and in them, as above said, there is no case to be found which does not hold that upon a joint judgment against husband and wife the estate by entirety can be sold."

**SEC. 7.** *Husband may insure his life for the benefit of wife and children.* The husband may insure his own life for the sole use and benefit of his wife and children, and in case of the death of the husband the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the representatives of her husband, or any of his creditors.

**SEC. 8.** *How deed for homestead may be made.* Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law.

**Validity of Conveyance.**—"Unless the homestead is 'alloted and occupied' the conveyance without the joinder of wife is valid except as to the dower interest." *Dalrymple v. Cole*, 181 N. C. 285, 288, 107 S. E. 4.

## ARTICLE XI

### PUNISHMENTS, PENAL INSTITUTIONS, AND PUBLIC CHARITIES

**SECTION 1.** *Punishments; convict labor; proviso.* The following punishments only shall be known to the laws of this State, viz: Death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State. The foregoing provision for imprisonment with hard labor shall be construed to authorize the employment of such convict labor on public works or highways, or other labor for public benefit, and the farming out thereof, where and in such manner as may be provided by law; but no convict shall be farmed out who has been sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson: Provided, that no convict whose labor may be farmed out shall be punished for any failure of duty as a laborer, except by a responsible officer of the State; but the convicts so farmed out shall be at all times under the supervision and control, as to their government and discipline, of the penitentiary board or some officer of this State.



SEC. 2. *Death punishment.* The object of punishments being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, rape, and these only, may be punishable with death, if the General Assembly shall so enact.

**Equal Protection, Cruel and Unusual Punishment.**—See note to §§ 4215, 4506.

**Limitations on Criminal Legislation.** — Our constitution established the only punishment for crimes recognized by the law of this State, and states, in this section, that the object of punishment is not only to satisfy justice but to reform the offender and thus prevent murder, arson, burglary and rape, and those punishable with death if the General Assembly shall so enact, and the 4th section of the Bill of Rights admonishes against cruel and unusual punishment, and it is within the discretionary authority of the Legislature, with these limitations, to pass upon, by proper enactment, the question of crime and its punishment. *State v. Burnett*, 179 N. C. 735, 102 S. E. 711.

SEC. 3. *Penitentiary.* The General Assembly shall, at its first meeting, make provision for the erection and conduct of a State's prison or penitentiary, at some central and accessible point within the State.

SEC. 4. *Houses of correction.* The General Assembly may provide for the erection of houses of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed.

**Husband Convicted of Abandonment.**—This section of our Constitution, making a person guilty of a misdemeanor punishable by commitment to houses of correction leaves this matter of establishing a house of correction discretionary with the legislative power, and a sentence may be imposed of imprisonment upon a husband convicted of abandonment under C. S., 4447, and other offenses of like kind, or to assign them to work on the roads during their term. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

SEC. 5. *Houses of refuge.* A house or houses of refuge may be established whenever the public interest may require it, for the correction and instruction of other classes of offenders.

SEC. 6. *The sexes to be separated.* It shall be required, by competent legislation, that the structure and superintendence of penal institutions of the State, the county jails, and city police prisons secure the health and comfort of the prisoners, and that male and female prisoners be never confined in the same room or cell.

SEC. 7. *Provision for the poor and orphans.* Beneficent provisions for the poor, the unfortunate and orphan, being one of the first duties of a civilized and Christian state, the General Assembly shall, at its first session, appoint and define the duties of a board of public charities, to whom shall be entrusted the supervision of all charitable and penal State institutions, and who shall annually report to the Governor upon their condition, with suggestions for their improvement.

SEC. 8. *Orphan houses.* There shall also, as soon as practicable, be measures devised by the State for the establishment of

one or more orphan houses, where destitute orphans may be cared for, educated, and taught some business or trade.

SEC. 9. *Inebriates and idiots.* It shall be the duty of the Legislature, as soon as practicable, to devise means for the education of idiots and inebriates.

SEC. 10. *Deaf-mutes, blind, and insane.* The General Assembly may provide that the indigent deaf-mute, blind, and insane of the State shall be cared for at the charge of the State.

SEC. 11. *Self-supporting.* It shall be steadily kept in view by the Legislature and the board of public charities that all penal and charitable institutions should be made as nearly self-supporting as is consistent with the purposes of their creation.

## ARTICLE XII

### MILITIA

SECTION 1. *Who are liable to militia duty.* All able-bodied male citizens of the State of North Carolina, between the ages of twenty-one and forty years, who are citizens of the United States, shall be liable to duty in the militia: Provided, that all persons who may be averse to bearing arms, from religious scruples, shall be exempt therefrom.

SEC. 2. *Organizing, etc.* The General Assembly shall provide for the organizing, arming, equipping, and discipline of the militia, and for paying the same, when called into active service.

SEC. 3. *Governor Commander-in-chief.* The Governor shall be commander-in-chief and shall have power to call out the militia to execute the law, suppress riots or insurrection, and to repel invasion.

SEC. 4. *Exemptions.* The General Assembly shall have power to make such exemptions as may be deemed necessary, and to enact laws that may be expedient for the government of the militia.

## ARTICLE XIII

### AMENDMENTS

SECTION 1. *Convention, how called.* No convention of the people of this State shall ever be called by the General Assembly unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and except the proposition, convention or no convention, be first submitted to the qualified voters of the whole State, at the next general election, in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said convention, it shall assemble on such day as may be prescribed by the General Assembly.

SEC. 2. *How the Constitution may be altered.* No part of the Constitution of this State shall be altered unless a bill to alter the



same shall have been agreed to by three-fifths of each house of the General Assembly. And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State.

## ARTICLE XIV

### MISCELLANEOUS

SECTION 1. *Indictments.* All indictments which shall have been found, or may hereafter be found, for any crime or offense committed before this Constitution takes effect, may be proceeded upon in the proper courts, but no punishment shall be inflicted which is forbidden by this Constitution.

SEC. 2. *Penalty for fighting duel.* No person who shall hereafter fight a duel, or assist in the same as a second, or send, accept, or knowingly carry a challenge therefor, or agree to go out of the State to fight a duel, shall hold any office in this State.

SEC. 3. *Drawing money.* No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published.

SEC. 4. *Mechanic's lien.* The General Assembly shall provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject-matter of their labor.

SEC. 5. *Governor to make appointments.* In the absence of any contrary provision, all officers of this State, whether heretofore elected or appointed by the Governor, shall hold their positions only until other appointments are made by the Governor, or, if the officers are elective until their successors shall have been chosen and duly qualified according to the provisions of this Constitution.

SEC. 6. *Seat of government.* The seat of government in this State shall remain at the city of Raleigh.

SEC. 7. *Holding office.* No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes.

SEC. 8. *Intermarriage of whites and negroes prohibited.* All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation, inclusive, are hereby forever prohibited.

# 1925 North Carolina Cumulative Statutes and Notes to the Con- solidated Statutes

## CHAPTER I

### ADMINISTRATION

#### ART. 1. PROBATE JURISDICTION

##### § 1. Clerk of superior court has probate jurisdiction.

**When Jurisdiction Sole and Exclusive.**—Where applied for and granted to separate applicants for letters of administration in two counties, the one first acquiring jurisdiction has the sole and exclusive jurisdiction, though the decedent, at the time of his death, had his fixed domicile in both counties, and this jurisdiction, when once acquired, cannot be collaterally impeached. *Tyler v. Lumber Co.*, 188 N. C. 274, 124 S. E. 306.

**Where Letters Granted to Separate Parties.**—Where the clerks of two counties have granted letters of administration to separate parties, and in the Superior Court of each county, the judgment of the respective clerks has been affirmed, the Superior Court will determine which of the letters were properly granted. *Tyler v. Lumber Co.*, 188 N. C. 274, 124 S. E. 306.

**Evidence Conclusive on Supreme Court.**—The finding of fact by the clerk of the Superior Court, upon petition to revoke letters of administration upon the ground that intestate was domiciled in a different county from the one having issued the letters, is conclusive in the Supreme Court on appeal from the judgment of the Superior Court adopting the affirmative findings of fact found by the clerk and sustaining his judgment as to jurisdiction, when there is legal evidence upon which his findings may be sustained. *Tyler v. Lumber Co.*, 188 N. C. 268, 124 S. E. 305.

**Refusal of Clerk to Issue Letters.**—See notes to section 31.

#### ART. 3. RIGHT TO ADMINISTER

##### § 6. Order in which persons entitled.

See notes to § 20.

##### § 8. Disqualifications enumerated.

See notes to section 31.

**When Applicable—Section 137(8) Distinguished.**—Where a daughter takes the lands of her father, after the death of her mother, as a residuary legatee under his will, but as personalty under the equitable doctrine of conversion, and then dies intestate, without child or the representative of such child, leaving a husband surviving, the daughter acquires her mother's interest, under the provisions of C. S., 137, and her husband, upon her death, is entitled to the estate as her personalty under the provisions of this section, subject to the rightful demands of creditors; and C. S., 137 (8), as amended by Acts 1921, ch. 54, relating to instances where a married woman dies intestate, leaving a husband and a child, or the representative of such child, has no application. *McIver v. McKinney*, 184 N. C. 393, 114 S. E. 399.



**What Constitutes Renunciation.**—Upon petition to revoke letters of administration the petitioner may not avail himself of the fact that the deceased left a widow who was entitled to administer upon his estate instead of a brother of deceased to whom the letters were duly granted, when she has shown no disposition to set up this right before the clerk having issued the letters and has apparently acquiesced in the appointment of the clerk. *Tyer v. Lumber Co.*, 188 N. C. 268, 124 S. E. 305.

#### ART. 4. PUBLIC ADMINISTRATOR

### § 17. Appointment and term.

There may be a public administrator in every county, appointed by the clerk of the superior court for the term of [four] years. (Rev., s. 18; Code, s. 1389; 1868-9, c. 113; 1925, c. 253.)

### § 20. When to obtain letters.

**In General.**—The public administrator of a county has no right or interest in the estate of the deceased which would entitle him to administer, unless and until he has been appointed and qualified by the clerk upon the specific estate, C. S., 6, and after the period allowed for the relatives to qualify in the order specified by the statute, or some other person on their letter of renunciation. *In re Neal*, 182 N. C. 405, 109 S. E. 70.

#### ART. 6. COLLECTORS

### § 24. Appointment of collectors.

When, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. [When, for any reason, a delay is necessary in the production of positive proof of the death of any one who may have disappeared under circumstances indicating death of such person, any person interested in the estate of such person so disappearing as heir at law, prospective heir at law, a creditor, a next friend, or any other person or persons interested, either directly or indirectly, in the estate of such person so disappearing, may file with the clerk of the Superior Court of the county in which the person so disappearing last resided, or in case such person so disappearing was at the time of his disappearance a non-resident of the State of North Carolina, with the clerk of the Superior Court of any county in which any property was or might have been located at the time of such disappearance, a petition for the appointment of a collector of the estate of such person so disappearing, or the property of such person so disappearing, located within the county of the clerk to whom application is made, which petition shall set forth the facts and circumstances surrounding the disappearance of such person, and which petition shall be duly verified and supported by affidavit of persons having knowledge of the circumstances under which such person so disappeared, and if from such petition and such affidavits it should appear to the clerk that the person so disappearing is probably dead, then it shall be the duty of the clerk

to so find and to issue to some discreet person or persons, at his option, letters of collection authorizing the collection and the preservation of the property of such person so disappearing.] (Rev., s. 22; Code, s. 1383; cc. P. S. 463; R. C., c. 46, s. 9; 1924, c. 43.)

**Executor May Be Appointed Collector.**—Where a caveat to a will is duly filed and further proceedings stayed, it is discretionary with the clerk to appoint as collector for the preservation of the estate the one named in the paper-writing as executor, or some other to act as collector for that purpose. In re Little's Will, 187 N. C. 177, 121 S. E. 453.

#### ART. 7. APPOINTMENT AND REVOCATION

### § 31. Letters revoked for disqualification or default, or on application of surviving widow or next of kin.

**Adjudication of Clerk Subject to Review.**—The adjudication by the clerk of the unfitness of one named in a will as executor is subject to review by the Superior Court judge, and as to matters of law, in the Supreme Court on appeal. In re Will of Gulley, 186 N. C. 78, 118 S. E. 839.

**Refusal to Issue Letters.**—In In re Will of Gulley, 186 N. C. 78, 81, 118 S. E. 839, the court said: "Under section C. S., 31, the clerk is given power to revoke letters testamentary, and for the same causes he would certainly have the right to refuse to issue letters testamentary."

Where one who has taken possession of the personalty and has peculiar knowledge of it, refused information to the widow and all others, and to be examined by the clerk while passing upon his fitness, it is proper for the clerk to refuse to issue the letters of administration to him. In re Will of Gulley, 186 N. C. 78, 118 S. E. 839.

Where the clerk of the court has refused to issue letters of administration to the one named as executor in the will, and has exercised his discretion in appointing another—in this case the widow—the letters issued to the widow are effective. In re Will of Gulley, 186 N. C. 78, 118 S. E. 839.

#### ART. 8. BONDS

### § 36. No bond in certain cases of executor with power to convey.

Where a citizen or subject of a foreign country [or any other state of the United States], by will sufficient according to the laws of this state, and duly probated and recorded in the proper county, devises to his executor, with power to sell and convey, real property situated in this state in trust for a person named in the will, the power being vested in the executor as such trustee, the executor may execute the power without giving bond in this state. (1909, c. 901; 1925, c. 284.)

### § 39 (a). Oath before notary; curative statute.

In all cases prior to January the first, one thousand nine hundred and twenty-two, in which any foreign executor qualified or attempted to qualify as such executor by taking and subscribing the oath or affirmation required by law, before a notary public of this or any other state or territory of the United States, instead of taking and subscribing said oath or affirmation before the clerk, and having in all other respects complied with the laws of North Carolina prescribed for and pertaining to the qualification and appointment of foreign executors, such qualification and the letters testamentary



issued in all such cases are hereby validated and made legal and binding. In all cases mentioned in this section, wherein such foreign executor has entered upon the discharge of the duties of such office and has performed any duty or exercised the powers and authority of such office regularly and according to law, except for the defect in the qualification and issuance of letters testamentary, then all such acts of any such foreign executor are validated and are declared to be legal and binding. This section shall not affect litigation pending February 10, 1925, nor disturb any vested rights. (1925, c. 19.)

#### ART. 11. ASSETS

### **§ 65 (a). Payment to clerk of sums not exceeding \$300 due and owing intestates.**

Where any person dies intestate and at the time of his or her death there is a sum of money owing to the said intestate not in excess of three hundred dollars, such sum may be paid into the hands of the clerk of the superior court, whose receipt for same shall be a full and complete release and discharge for such debt or debts, and the said clerk of the superior court is authorized and empowered to pay out such sum or sums in the following manner: First, for satisfaction of widow's year's allowance, after same has been assigned in accordance with law, if such be claimed; second, for payment of funeral expenses, and if there be any surplus the same to be disposed of as is now provided by law. This section shall apply to the counties of Guilford, Cabarrus, Iredell, Moore, Anson, Watauga, Cumberland, Johnston, Rutherford, Stanly, Davidson, Currituck, Yadkin, Alexander, Stokes, Clay, Greene, Wayne, Franklin, Macon, Beaufort, Swain, Haywood, Caldwell, Burke, Gates, Rockingham, Graham, Lee, Person, Catawba, Dare, Tyrrell, Perquimans, Transylvania, Duplin, Hyde, Pender, Alamance, Harnett, [Halifax and Hertford] and Pasquotank, [Mecklenburg and Robeson]. (1924, c. 15, s. 8.)

#### ART. 12. SALES OF PERSONAL PROPERTY

### **§ 69. Clerk may order private sale in certain cases; advance bids.**

Whenever the executor or administrator of any estate shall be of the opinion that the interests of said estate will be promoted and conserved by selling the personal property belonging to it at private sale instead of selling same at public sale, such executor or administrator may, upon a duly verified application to the clerk of the Superior Court, obtain an order to sell, and may sell, such personal property at private sale for the best price that can be obtained, and shall report such sales to the clerk for confirmation; and upon satisfactory proof that said personal property has been sold for a fair and adequate price, such sale shall be confirmed by said clerk.

The said sale or sales of personal property shall not be deemed closed under ten days from the filing of such report; and if in ten days from the filing of such report the sale price is increased by the

deposit of ten (10) per cent with the said clerk, the said clerk shall order a new sale thereof. The clerk may in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with his said offer. If no advance bid is offered for the property and if no exception is filed thereto within said period of ten (10) days, the same shall be confirmed.

Where the estate consists in whole or in part of perishable property the executor or administrator may sell such perishable property at private sale without order or confirmation by the clerk of the Superior Court. (Rev., s. 64; 1893, c. 346; 1919, c. 66; 1925, c. 267.)

**Editor's Note.**—The scope of this section has been somewhat enlarged by the Act of 1925. Prior to that Act the selling authority of the executor or administrator was limited to certain enumerated classes of property. The last two paragraphs of the section as it now reads were added by the Act.

**Section Permissive Not Mandatory.**—In *In re Brown*, 185 N. C. 398, 402, 117 S. E. 291, the court said: "It would seem that this statute was only permissive in character, and not mandatory upon the clerk or the judge having jurisdiction of the cause."

**Discretion of Court or Judge.**—The provisions of this section, allowing the personal representative in certain cases, upon application to the clerk and obtaining his order therefor, to expose certain personal property therein specified at private sale for the best obtainable price, and report the sale for confirmation, does not take away from the clerk, or judge on appeal, the sound discretionary powers of determining whether a public or private sale would best subserve the interest of the parties, or to authorize a private sale when in the discretion of the clerk or judge, as the case may be, it was to their best interest. In *re Brown*, 185 N. C. 398, 117 S. E. 291.

**Confirmation of Private Sale Denied.**—On appeal to the Supreme Court from an order of the judge denying the petitioner's prayer for the confirmation of a private sale, as administratrix of her husband's estate, she had agreed to make to her two sons, under the objection of others of the heirs at law, the presumption is, nothing else appearing, that there was sufficient evidence before the judge to sustain his findings of fact upon which he had based his order; and in this case, held, there was evidence of record appearing from the verified pleadings and affidavits of respondent, sufficient to sustain his order that the property be advertised and sold at public outcry. In *re Brown*, 185 N. C. 398, 117 S. E. 291.

### ART. 13. SALES OF REAL PROPERTY

#### § 80. Heirs and devisees necessary parties.

No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law: [*Provided*, that in any proceedings for the sale of land to make assets, when there are heirs of said decedent, or there may be heirs of said decedent whose names and residences are unknown, and it is desired to make all unknown heirs of said decedent parties to said proceedings, and the personal representative shall make such representation in his petition, then all unknown heirs of the said decedent shall be made party defendants in the same as the unknown



heirs of said decedent naming him, and as thus denominated and under this name all said unknown heirs shall be served with summons by publication as now regularly provided by law for the service of summons by publication in the Superior Court, and upon such service being had, the court shall appoint some discreet person as guardian *ad litem*, for said unknown heirs, and summons shall issue to him as such. Said guardian *ad litem* shall file answer for said unknown heirs, and defend for them, and he may be paid such sum as the court may fix, to be paid as other costs out of the estate. Upon the filing of the answer by said guardian *ad litem*, all said unknown heirs shall be before the court for the purposes of the action to the same extent as if each had been served with summons by name, and any claim that they may make to said real estate so sold shall be transferred to the funds in the hands of the personal representative to the same extent as other distributees of said estate and no further. This proviso shall apply to actions now pending, and all the proceedings to sell land for assets heretofore had, where unknown heirs have been summoned by publication, are hereby validated.] (Rev., s. 74: Code, s. 1438, c. 113, s. 44; 1924, c. 3, s. 1.)

### § 92 (c). Application of two preceding sections.

Sections 92 (a) and 92 (b) shall apply only to sales of lands made under the circumstances narrated in those sections, occurring [prior to January 1, 1925.] (1923, c. 70, s. 3; 1925, c. 48.)

## ART. 15. ACCOUNTS AND ACCOUNTING

### § 108. Gravestones authorized.

It is lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The cost thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than one hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose. (Rev., s. 102; 1905, c. 444; 1925, c. 4.)

**Editor's Note.**—The last clause of this section formerly provided that the order be approved by the resident judge of the district. This was omitted by the Act of 1925.

## ART. 16. DISTRIBUTION

### § 137. Order of distribution.

**When Beneficiaries Take Surplus as Personalty.**—Where a testator directs that his real estate be sold and the proceeds first applied to the payment of his debts, and should any surplus remain, it should be divided among certain beneficiaries, such beneficiaries take the surplus as personalty under the doctrine of equitable conversion, subject to the

law of descent applicable to property of that character. *McIver v. McKinney*, 184 N. C. 393, 114 S. E. 399.

Where a daughter takes the lands of her father, after the death of her mother, as a residuary legatee under his will, but as personalty under the equitable doctrine of conversion, and then dies intestate, without child or the representative of such child, leaving a husband surviving, the daughter acquires her mother's interest, under the provisions of this section, and her husband, upon her death, is entitled to the estate as her personalty under the provisions of C. S., 7, subject to the rightful demands of creditors; and this section, as amended by Acts of 1921, ch. 54, relating to instances where a married woman dies intestate, leaving a husband and a child, or the representative of such child, has no application. *McIver v. McKinney*, 184 N. C. 393, 114 S. E. 399.

#### ART. 17. SETTLEMENT

##### § 150. Representative must settle after two years.

**Settlement within Two Years Period.**—While this section allows executors and administrators two years within which to settle the decedent's estate, with an extension of time for good cause shown, this does not necessarily give them the two years in which to make settlement when the status of the estate would otherwise permit, and if the estate is so far advanced as to justify it, the executors and administrators may be called on by the beneficiaries to account and pay over within the two years period. *Snow v. Boylston*, 185 N. C. 321, 117 S. E. 14.

##### § 156. When legacies may be paid in two years.

See note to § 150.

#### ART. 18. ACTIONS BY AND AGAINST REPRESENTATIVES

##### § 159. Action survives to and against representative.

**Action on Insurance Policy.**—In *Fox v. Volunteer State Life Ins. Co.*, 185 N. C. 121, 123, 116 S. E. 266, the court said: "The policy of insurance in this case was issued in favor of the executor or administrator, the application was signed by plaintiff's intestate, and the plaintiff, as his administrator, was the proper party to bring the action."

##### § 160. Death by wrongful act; recovery not assets; dying declarations.

See notes to § 3465 et seq.

**Purpose of Section.**—This section has been held to create a new cause of action only in the sense that at common law an action for the wrongful death did not survive to the personal representatives of the deceased; and the purpose of the statute was to withdraw claims of this kind from the effect and operation of the maxim *actio personalis moritur cum persona*, and to continue, as the basis of the claim of his estate the wrongful injury to the person resulting in death. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

**Rule of Evidence Changed.**—This is a general statute changing the rule of evidence, in which no one has a vested interest and which the law-making power can extend, alter or repeal at will. *Williams v. Randolph & Cumberland Ry. Co.*, 182 N. C. 267, 273, 108 S. E. 915.

**Writ of Attachment May Issue.**—The history of legislation as to attachments culminating in C. S., 798 (4), shows a legislative intent to broaden the right of this writ to make the same well-nigh coextensive with any well-grounded demand for judgment in personam, and is suffi-



ciently comprehensive to include the action for "causing the death of another by wrongful act, neglect, or default of another." *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

**Injury to the Person.**—A recovery for a wrongful death allowed by this section, depending upon the question of self-defense in case of willful injury, and on contributory negligence in case of "negligent act," or upon settlement of the damages in his lifetime by the one injured, shows that it was in the contemplation of the statute that the "injury to the person" should continue after his death to be a constituent part of the statutory action allowed to the personal representatives, and comes within the provisions of C. S., 798 (4), affording the remedy by attachment for the injury to the person by negligent or wrongful act. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

**Provision Regarding Time a Condition.**—An action to recover damages for a death caused by wrongful act did not lie at common law and exists in North Carolina by provision of this section, requiring that it be brought within one year, not as a statute of limitation, which must be pleaded, but as a condition annexed to the plaintiff's cause of action, and which he is required to prove at the trial to sustain his statutory right of recovery. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529.

**Same—Service Insufficient.**—Where, in an action to recover damages for a death caused by a wrongful act, under this section, the summons has been issued within a day or two from the termination of the year, annexed as a condition, and returnable thereafter, and according to the officer's certificate thereon, uncontradicted, it was not returned at the term therein named, but at a later term of the court, with another summons issued upon affidavit after the period required by the statute, endorsed "alias original," without further indication that it had been issued for an alias process or on order from the judge: It was held that such service is insufficient to meet the requirement that the action shall be commenced within a year from the date of the wrongful death. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529.

In an action to recover damages for the death by wrongful act, required by the statute to be brought within a year, by this section, the process officer failed to make a valid service upon an agent of defendant corporation, by not leaving a copy of the process, and after the return term served the first summons on the defendant's president, and at the same time another process, marked by the clerk "alias original" summons, without anything in the second summons to indicate its alleged relationship to the original: It was held that the service of the first summons being fatally defective, and the last not conforming to the law in respect to the issuance of alias summons so as to relate back to the original, the service upon the defendant's president after the period fixed as a condition to the right of action, is fatally defective, and the plaintiff cannot recover. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529.

**When Appearance of Defendant Not Voluntary.**—Where the original service on a corporation is fatally defective for failure of the process officer to leave a copy of summons with defendant's agent as required by the statute, and another summons has been properly served on the defendant's president, but without preserving the continuity of the process, in an action to recover damages for a wrongful death under the provisions of this section: It was held that the appearance of the defendant to resist recovery upon the ground that the plaintiff had not brought his action within the year, is not a voluntary appearance, and will not amount to a waiver of service of process within that period, as to the first summons, the service of the second summons being valid, and it being permissible for the defendant to await the plaintiff's evidence upon his allegation that he had brought his action within the time required by the statute as a condition annexed to his right thereof. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529.

**Admission of Declaration.**—The last paragraph of this section is a

constitutional and valid change of the rules of evidence, and permits in evidence such declarations of the act of killing and circumstances immediately attendant on the act, which constitutes a part of the *res gestae*, and uttered when the declarant was in actual danger of death, and full apprehension thereof, and when the death accordingly ensued. *Tatham v. Andrews Mfg. Co.*, 180 N. C. 627, 105 S. E. 423.

The amendment of 1919 to this section, enlarging the rule of the admissibility of evidence of dying declarations to instances of wrongful death, does not change any vested rights, and is applicable in cases where such death was caused before its passage. *Williams v. Randolph & Cumberland Ry. Co.*, 182 N. C. 267, 108 S. E. 915.

In case of the admission of dying declarations, as in criminal actions for homicide, the dying declarations of one whose wrongful death has been caused to be admissible upon the trial in an action to recover damages for his wrongful death, must have been voluntarily made while the declarant was in extremis or under a sense of impending death, and confined to the act of killing and the attendant circumstances forming a part of the *res gestae*. *Dellinger v. Elliott Building Co.*, 187 N. C. 845, 123 S. E. 78.

Under the provisions of this section amended by the Legislature of 1919, permitting dying declarations in actions to recover damages for a wrongful death, in like manner and under the same rules as such declarations in criminal actions for homicide, are admissible, the dying declarations of the deceased in an action, against railroad company to recover damages for his negligent killing while crossing the defendant's tracks at a public crossing, that "I am going to die. I am broken all to pieces. I want you to see that they pay you for this. I did not see the train," are competent, when the attendant circumstances are fully in evidence, without question as to the death having been caused by the defendant's train at the crossing. *Williams v. Randolph & Cumberland Ry. Co.*, 182 N. C. 267, 108 S. E. 915.

Under the evidence of this case a part of the dying declarations of the deceased that he was broken all to pieces, and he wanted the railroad company to pay, was competent as expressing his conviction that he knew that death was rapidly approaching and had abandoned hope, and as being an integral part of the whole of his declaration. *Williams v. Randolph & Cumberland Ry. Co.*, 182 N. C. 267, 108 S. E. 915.

**Action against Estate of One Causing Wrongful Death.**—Where a person is alleged to have caused the death of another by his wrongful act, neglect, or default, and suit has been brought against him and is pending at his death, within one year after the wrongful death caused by him, an action will lie against the executor and administrator of the deceased defendant under the provisions of this section. *Tonkins v. Cooper*, 187 N. C. 570, 122 S. E. 294.

**Evidence of Negligence of Vice-Principal.**—In an action to recover for the wrongful death of plaintiff's intestate involving the question of the negligence of the defendant's vice-principal, it is not required that the complaint allege that the vice-principal was absent at the time of the injury, for the plaintiff to introduce evidence of this fact, and that another was acting in this capacity in his absence. *Dellinger v. Elliott Building Co.*, 187 N. C. 845, 123 S. E. 78.

**Suit by Personal Representative Only.**—Under Lord Campbell's Act (C. S. this section) the suit must be brought by the personal representative, and cannot be prosecuted by the widow of the deceased. *Craig v. Suncrest Lumber Co.*, 189 N. C. 137, 126 S. E. 312, 313.

**Basis of Damages.**—In *Cobia v. Railroad Co.*, 188 N. C. 487, 493, 125 S. E. 18, the Court said:—"Under this section, giving a right of action for wrongful death, the damages are based upon the present worth of the net pecuniary value of the life of the deceased (*Horton v. R. R.*, 175 N. C. 477), while under the Federal Employers' Liability Act the damages recoverable are based upon the pecuniary loss sustained by the beneficiaries."



**§ 162. Actions which do not survive.**

The right of action for partition of lands, survives the death of the plaintiff. *White v. White*, 189 N. C. 236, 126 S. E. 612.

**ART. 19. REPRESENTATIVE'S POWERS, DUTIES AND LIABILITIES****§ 176 (a). Power to renew obligation; no personal liability.**

In all cases where a decedent is the maker or one of the makers, a surety or one of the sureties, an endorser or one of the endorsers of any note, bond or other obligation for the payment of money which is due or past due at the death of said decedent, or shall thereafter become due prior to the settlement of the estate of said decedent, the administrator, executor or collector of said decedent's estate is hereby authorized and empowered to execute as such administrator, executor or collector a new note, bond or other obligation for the payment of money, in the same capacity as decedent was obligated for the same amount or less but not greater than the sum due on the original obligation which shall be in lieu of the original obligation of the decedent, whether made payable to the original holder or another, and is authorized and empowered to renew said note, bond or other obligation for the payment of money from time to time, and said note, bond or other obligation for the payment of money so executed by said administrator, executor or collector shall be binding upon the estate of said decedent to the same extent and in the same manner and with the same effect that the original note, bond or other obligation for the payment of money so executed by the decedent was binding upon his estate: *Provided*, the time for final payment of the note, bond or other obligation for the payment of money, or any renewal thereof by said administrator, executor or collector shall not extend beyond a period of two years from the qualification of the original administrator, executor or collector as such upon the estate of said decedent. The executor of any note, bond or other obligation for the payment of money mentioned in this section by the administrator, executor or collector of the decedent shall not be held or construed to be binding upon said administrator, executor or collector personally. (1925, c. 86.)

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**CHAPTER 2****ADOPTION OF MINORS****§ 185. Effect of order; child's right of succession.**

**Purpose.**—The plain intent and language of this section and section 278 is that a child so adopted, or legitimated, shall inherit his father's real estate, and be entitled to the personal estate of his father "in the same manner as if it had been born in lawful wedlock." *Love v. Love*, 179 N. C. 115, 116, 101 S. E. 562.

**"Heirs Lawfully Begotten."**—Adopting an illegitimate child by ulterior remainderman does not fulfill the condition of a devise that he have "heirs lawfully begotten." *Love v. Love*, 179 N. C. 115, 101 S. E. 562.

## CHAPTER 4

## ATTORNEYS AT LAW

## ART. 1. LICENSES AND QUALIFICATIONS OF ATTORNEYS

## § 196. Conditions precedent to examination.

**Signatures to Certificate Required.**—In *re* Dillingham's, 188 N. C. 162, 165, 124 S. E. 130, the Court said:—"The statute pertinent (this section), provides, as stated, that the applicant shall file with the clerk a certificate of good moral character, signed by two attorneys who practice in this Court. It will be noted that this is not by persons who are merely qualified, but attorneys who in fact practice before us, and we consider it not amiss to admonish our brethren of the bar that the signing of this certificate is not a formal or perfunctory act, but should be given only from personal knowledge or after painstaking inquiry into the matter. By observing this requirement they can do much to aid the Court in protecting our profession from unworthy members."

## ART. 3. ARGUMENTS

## § 203. Court's control of argument.

**What Constitutes Breach of Rights of Accused.**—The court told the jury, in a criminal case that it had intimated to counsel for defendant the instruction which he would give but that counsel notwithstanding the intimation has seen fit to argue the case. This was a breach of the rights of the accused under this section and § 4515. *State v. Hardy* (N. C.), 128 S. E. 152.

## CHAPTER 5

## BANKS

## ART. 2. CREATION

## § 217 (n). Consolidation of banks, building and loan and insurance corporations.

Banking corporations, with the approval of the Corporation Commission, and in conformity with such requirements and regulations as that body may prescribe, and building and loan and insurance corporations, with the approval of the Insurance Commissioner, and in conformity with such requirements and regulations as he may prescribe, may merge and consolidate under the provisions of this act. (1925, c. 77, s. 2.)

## ART. 4. STOCKHOLDERS

## § 219 (f). Impairment of capital; assessments, etc.

The corporation commission shall notify every bank whose capital shall have become impaired from losses or any other cause, and the surplus and undivided profits of such bank are insufficient to make good such impairment, to make the impairment good within sixty days of such notice by an assessment upon the stockholders thereof,



and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made: Provided, that such bank may reduce its capital to the extent of the impairment, as provided in section 217 (j). If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none therein, a newspaper circulating in the county in which the bank is located, to make good the deficiency, and the balance, if any, shall be returned to the delinquent shareholder or shareholders. If any such bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the corporation commission, the corporation commission may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law. A sale of stock, as provided in this section, shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of such stock; [but in the event the stock of any stockholder be sold as hereinbefore provided, and the said stock when sold fails to bring the amount of the assessment against said stockholder, then, and in such event, the said stockholder shall be personally liable for the difference between the amount of said assessment and the price brought by the sale of said stock.] (Ex. Sess. 1921, c. 56, s. 3; 1925, c. 117.)

**Meaning of "Payable in Cash."**—In *Elon Banking, etc., Co. v. Burke*, 189 N. C. 69, 126 S. E. 163, 164, the Court said:—"We are not inadvertent to the expression in the amendment (this section) that the assessment is 'payable in cash,' but to our minds that merely means that the amount is presently due, and its payment may be presently enforced, but only by the methods the statute specifies, to wit, a sale of the stock."

**Analogy to National Banking Act.**—In *Elon Banking, etc., Co. v. Burke*, 189 N. C. 69, 126 S. E. 163, 164, the Court said:—"A perusal of the amendment (this section) will disclose that, in so far as same confers upon the bank the power to make the assessment, its provisions are substantially similar to that provided in the National Banking Act, 6 Federal Statutes Annotated, § 5205 (U. S. Comp. St. § 9767), designed principally for the strengthening of banks whose capital has become impaired, and the federal cases construing the latter act are to the effect that no personal liability is contemplated or provided for. The decisions proceed upon the principle very generally accepted that, where a statute creates a new right or liability, and provides a special remedy for its enforcement, such remedy is to be regarded as exclusive, and actions or proceedings ordinarily available may not be resorted to."

**Personal Action Not Allowed.**—In *Elon Banking, etc., Co. v. Burke*, 189 N. C. 69, 126 S. E. 163, 164, the Court said:—"A bank acting under its provisions (this section) may only proceed by sale of the stock, and that a personal action to enforce collection is not allowed."

## ART. 5. POWERS AND DUTIES

**§ 220 (a). General powers.**

In addition to the powers conferred by law upon private corporations, banks shall have the power:

1. To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security or real and personal property. Such corporations at the time of making loans or discounts may take and receive interest or discounts in advance.

2. To adopt regulations for the government of the corporation not inconsistent with the Constitution and laws of this state.

3. To purchase, hold, and convey real estate for the following purposes:

(a) Such as shall be necessary for the convenient transaction of its business, including furniture and fixtures, with its banking offices and other apartments to rent as a source of income, which investment shall not exceed fifty per cent of its paid-in capital stock and permanent surplus: Provided, that this provision shall not apply to any such investment made before the ninth day of March, one thousand nine hundred and twenty-one. [*Provided further*, that the Corporation Commission may in its discretion authorize the continuance of investments made prior to the first day of February, one thousand nine hundred and twenty-five, of the character described in paragraph (a), subsection three, of section twenty-six of the Public Laws of one thousand nine hundred and twenty-one.]

(b) Such as is mortgaged to it in good faith by way of security for loans made or moneys due to such banks.

(c) Such as has been purchased at sales upon foreclosures of mortgages and deeds of trust held or owned by it, or on judgments or decrees obtained and rendered for debts due to it, or in settlements affecting security of such debts. All real property referred to in this subsection shall be sold by such bank within one year after it is acquired, unless, upon application by the board of directors, the corporation commission extends the time within which such sale shall be made. Any and all powers and privileges heretofore granted and given to any person, firm, or corporation doing a banking business in connection with a fiduciary and insurance business, or the right to deal to any extent in real estate, inconsistent with this chapter, are hereby repealed. (1921, c. 4, s. 26; 1923, c. 148, s. 5; 1924, c. 67; 1925, c. 279.)

**§ 220 (d). Loans, limitations of.**

The total direct and indirect liabilities of any person, firm or corporation, other than municipal corporations, for money borrowed, including in the liabilities of a firm the liabilities of the several mem-



bers thereof, shall at no time exceed [twenty per cent] of the capital stock and permanent surplus of any bank having a paid-in capital of two hundred and fifty thousand dollars or less [provided that upon the approval of two-thirds of the directors of such bank any loan may be increased to twenty-five per cent of the capital and surplus]; not more than twenty per cent of the capital and permanent surplus of any bank having a paid-in capital of more than two hundred and fifty thousand dollars, but not more than five hundred thousand dollars; not more than fifteen per cent of the capital and permanent surplus of any bank having a paid-in capital of more than five hundred thousand dollars, but not more than seven hundred and fifty thousand dollars; and not more than ten per cent of the capital and permanent surplus of any bank having a paid-in capital of more than seven hundred and fifty thousand dollars: Provided, however, that the discount of bills of exchange drawn in good faith against actually-existing values, the discount of [solvent] trade acceptances or other [solvent] commercial or business paper actually owned by the person, firm, or corporation negotiating the same, and the purchase of any notes secured by not less than a like face amount of bonds of the United States or state of North Carolina, or certificates of indebtedness of the United States, shall not be considered as money borrowed within the meaning of this section: Provided further, that the limitations upon loans herein imposed shall not apply to existing loans or extensions and renewals thereof, except as same may be made to apply by general or special regulations of the corporation commission. (1921, c. 4, s. 29; 1923, c. 148, s. 6; 1925, c. 119, s. 1.)

### **§ 220 (n). Checks sent direct to bank on which drawn.**

**Sending Check to Federal Reserve Bank.** — Under this section the sending of a cashier's check to the proper Federal Reserve bank is "due diligence" in collecting the same, as would be sending it directly to the drawee bank. *Fed. Land Bank v. Barrow*, 189 N. C. 303, 127 S. E. 3.

### **§ 220 (w). Boards of directors, banks controlled by.**

The corporate powers, business, and property of banks doing business under this chapter shall be exercised, conducted, and controlled by its board of directors, which shall meet at least quarterly. Such board shall consist of not less than five directors, to be chosen by the stockholders, and shall hold office for one year, and until their successors are elected and qualified. [The annual meeting of stockholders for the election of directors shall be held during the month of January for each year.] (1921, c. 4, s. 48; 1925, c. 107.)

### **§ 220 (z). Fees on remittances covering checks.**

**Conflict with Federal Statute.**—In *Farmers, etc., Bank v. Federal Reserve Bank*, 183 N. C. 546, 112 S. E. 252, the Court said:—"The statute of North Carolina, Laws 1921, ch. 20 (this section), was intended for the benefit of the State banks in this State, by authorizing them to continue to charge exchange for remitting by draft or otherwise for checks sent to them through the mails, but that policy, however desirable for such banks, is clearly in conflict with the valid constitutional provision of the Federal statute (U. S. Comp. § 9796). No act of this State can authorize

the drawee bank to pay less than the face amount of the check drawn upon it by its depositor or to remit its check in payment or pay it otherwise than in legal tender money. Nor can it require that the Federal Reserve Bank shall pay a fee, or that the bank here may remit less than the face value of the check when the Federal statute forbids such charge. It is true that the Federal Reserve Bank, as holder of the check, has no contract rights with the drawee bank until the check is presented, but as holder it can require payment of the face amount of the check in legal tender, and under the act of Congress it cannot pay a deduction from that face value by accepting a remittance to the Reserve Bank of a lesser amount. The Reserve Bank always incloses with the check sent to the payee bank a stamped and addressed envelope for the check to be remitted in payment, which must be for the face amount of the check sent. The Federal statute, being a regulation of the Federal corporation by Congress, the act of this State authorizing the paying bank here to exact exchange is in direct conflict with the duty imposed upon the Federal Reserve Bank by the act of Congress and the Reserve Bank is restricted by its duty to observe the provision of the Federal act and refuse to receive a check for less than the face amount of the check sent by it for collection. It is true it cannot enforce payment of the face amount except by personal presentation of the check at the counter of the paying bank, but it has a right to refuse a check sent to it by the paying bank for less than the full face amount, and to protest the check it has sent here for collection for nonpayment. The matter then becomes one between the drawer of the check and the paying bank who refuses to pay it. The U. S. Constitution, Art. VI, (sec. 2), provides that the Constitution of the United States, and the laws made in pursuance thereof, "shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." In the matter before us the act of Congress which provides that no exchange shall be allowed by the Reserve Bank for remitting for the collection of any check by any bank is in direct conflict with the statute of this State authorizing the paying bank to remit a lesser amount than the face amount of any check paid by it if presented by the Federal Reserve Bank. In this conflict of authority the Federal law is supreme.

### § 220 (aa). Checks payable in exchange.

**Payment Only in Exchange.**—Under this section the Federal Reserve Bank cannot demand payment in any other medium than exchange. *Fed. Land Bank v. Barrow*, 189 N. C. 303, 127 S. E. 3.

**Insolvent Bank Draft No Payment.**—In spite of this section, where a bank purports to pay a check by draft, which is in fact never paid on account of the insolvency of the bank, this will not constitute payment of the check. *Graham v. Proctorville Warehouse*, 189 N. C. 533, 127 S. E. 540.

## ART. 6. OFFICERS AND DIRECTORS

### § 221 (n). Officers and employees may borrow, when.

No officer or employee of a bank, nor a firm or partnership of which such officer or employee is a member, nor a corporation in which such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the same has been approved by a majority of the board of directors and a resolution, duly entered upon the minutes of the board of directors and signed by them, showing the amount of the loan, the directors ap-



proving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness. (1921, c. 4, s. 62; 1925, c. 119.)

**Editor's Note.**—The scope of this section was broadened by the Act of 1925. The prohibition was extended to employees as well as officers. The provision as to partnerships and corporations in which officers or employees are interested is new. The provisions at the end of the section requiring entry of the resolution of the directors on the minutes and a certified copy thereof attached to the instrument is also new. It is to be noted that the provision for authorization of such loan by a committee of directors is omitted.

## ART. 8. BANK EXAMINERS

### § 223 (a). Appointment by corporation commission.

**Power to Supervise Banks.**—Among other powers conferred by statute, the Corporation Commission may, without taking possession of the business and property of a State bank, upon its appearing to the commission to be in imminent danger of insolvency, direct upon what conditions its officers may continue in its management and control, and thus, upon the bank's complying therewith, avoid losses to depositors, creditors, and stockholders, necessarily incident to the closing of its doors. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316.

**Liability of Stockholders under Agreement to Restore Capital.**—Where, upon the examination of a State bank by the chief examiner of the Corporation Commission, it appears that its continued management by its officers would result in loss to its creditors, depositors, or stockholders, unless upon compliance with certain conditions, and the directors, also stockholders therein, have passed a resolution and have separately and individually agreed to restore the impairment of its capital stock, as directed by the bank examiner, according to their several holdings of shares of stock therein, the members thus assenting, become liable to the bank under the terms of their agreement, as the beneficiaries of the agreement, jointly and severally, to the extent they have assumed the liability; and where some of them have paid the liability of others under this agreement, each one of them may maintain his action against each of the defaulting members (C. S., 446), and such is not a misjoinder of parties prohibited by statute. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316.

**Same—Liability of Directors.** — The agreement of the directors to make good the impairment of the capital stock of a State bank as a condition precedent to the management of its business by its own officers, and at the instance of the State Bank Examiner, acting according to the power conferred by the statute upon the Corporation Commission, renders such directors, as stockholders, liable to the extent of the obligations they have thus assumed, this liability being independent of, and not contemplated by, the statute creating an additional liability to the amount of stock held by them in the banking corporation. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316.

An agreement of the board of directors of a State bank, both by resolution and individually, to comply with the order of the State Bank Examiner in making good an impairment of the capital stock of the bank and putting the bank in a safe condition for the continuance of its business, may be enforced by the bank, or in subrogation to its rights by those of the directors who have paid the obligations of others who have failed in the performance of their individual agreement, the contract thus made being for the benefit of them all. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316.

ART. 9. PENALTIES

§ 224 (c). Bank, unauthorized use of the word.

**Section 4401 Not in Conflict.** — C. S., 4401, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with this section. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

**Same—Conviction of Depositor.**—In order to convict a depositor at a bank who has abstracted funds from the bank in collusion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously "abstracted," under the provisions of C. S., 4401; and he may be convicted thereunder when the bill of the indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of this section. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

§ 224 (g). Insolvent banks, receiving deposits in.

**The word "insolvent,"** in the statute making it a felony of an officer of the bank, etc., to receive deposits therein with knowledge of its insolvency, means when the bank cannot meet its depositary liabilities in due course, and does not require that the condition of the bank should at the time be such as to enable it at any given time to pay all of its depositors in full at the same time on demand. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616.

**Defense Permitted Bank Officer.**—In an action to convict under this section, an officer of a bank for receiving, etc., deposits therein at a time he knew of its insolvency, the question as to his knowledge is ordinarily to be determined with reference to a variety of facts and circumstances, and in defense it is permitted him to go into an investigation of the assets and property of the bank at the date of the deposits, and their value at that time or thereafter, when bearing upon their worth at the time they were charged to have been unlawfully received. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616.

**What State Must Prove.** — In order for a conviction under the provisions of this section the State must prove beyond a reasonable doubt the actual receipt of the deposits by defendant officer of the bank at the time when the bank was insolvent to his own knowledge, or that such officer permitted an employee of the bank to receive the deposits with knowledge of these facts. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616.

**Testimony of Bank Examiner.**—In an action under this section to convict an officer of a bank for receiving or permitting an employee to receive deposits at a time he knew of the insolvency of a State bank, the testimony of the State Bank Examiner is to be received as that of an expert upon the question of the bank's insolvency. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616.

**Same—Not Conclusive.**—Where the defendant is tried as an officer of a bank for unlawfully receiving deposits of the bank, or permitting them to be received, in violation of this section, and the State Bank Examiner and another expert have been permitted to give their testimony as to its insolvency at the time upon their investigation, without stating the basis of their opinions thereon, it may not be decided as a matter of law, upon conflicting evidence, that the defendant must have known of the insolvent condition testified to by the experts. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616.



## ART. 10. INDUSTRIAL BANKS

**§ 225 (f). Powers.**

In addition to the general powers conferred upon corporations [by section 1126 of the Consolidated Statutes], every industrial bank shall have the following powers:

1. To loan money on real or personal security and reserve lawful interest in advance upon such loans, and to discount or purchase notes, bills of exchange, acceptances or other choses in action.

2. To sell or offer for sale its secured or unsecured evidences or certificates of indebtedness, or investment, and to receive from investors therein or purchasers thereof payments therefor in installments or otherwise, with or without an allowance of interest upon such payments, whether such evidence or certificates of indebtedness or of investment be hypothecated for a loan or not, and to enter into contracts in the nature of a pledge or otherwise with such investors or purchasers with regard to such evidences or certificates of indebtedness, or of investment; and no such transaction shall in any way be construed to affect the rate of interest on such loans.

3. To charge for a loan made pursuant to this section one dollar for each fifty dollars or a fraction thereof loaned, up to and including loans of two hundred and fifty dollars, and for loans in excess of two hundred and fifty dollars, one dollar for each two hundred and fifty dollars excess or fraction thereof, to cover expenses, including any examination or investigation of the character and circumstances of the borrower, comaker, or surety. An additional fee of five dollars may be charged on such loans where same are secured by mortgage on real estate. No charge shall be collected unless a loan shall have been made.

4. To establish branch offices or places of business within the county in which its principal office is located, and elsewhere in the state, after having first obtained the written approval of the corporation commission, which approval may be given or withheld by the corporation commission in its discretion: Provided, that the corporation commission shall not authorize the establishment of any branch the paid-in capital of whose parent bank is not sufficient in amount to provide for the capital of at least twenty-five thousand dollars (\$25,000.00) for the parent bank and at least twenty-five thousand dollars (\$25,000.00) for each branch which it is proposed to be established in cities or towns of fifteen thousand population or less; nor less than fifty thousand dollars (\$50,000.00) in cities or towns whose population exceeds fifteen thousand but does not exceed twenty-five thousand; nor less than one hundred thousand dollars (\$100,000.00) in towns whose population exceeds twenty-five thousand. (1923, c. 225, s. 6; 1925, c. 199, s. 1.)

**Editor's Note.** — By the Act 1925, the words in brackets in this section were substituted for the words "formed under the chapter on corporations."

**§ 225 (m). Sections of general law applicable.**

Sections 217 (b), 217 (h), [220 (c)], 222 (b), 222 (d), 222 (e), 222 (g), 223 (a)-223 (g), 224 (a), relating to the supervision and examination of commercial banks, shall be construed to be applicable to industrial banks, in so far as they are not inconsistent with the provisions of this article. (1923, c. 225, s. 13; 1925, c. 199, s. 2.)

**§ 225 (o). Stockholders, individual liability of.**

The stockholders of every industrial bank organized under the laws of North Carolina, whether under the general law or by special act, shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation, to the extent of the amount of their stocks therein at par value thereof, in addition to the amount invested in such shares. The term stockholders, when used in this act, shall apply not only to such persons as appear by the books of the corporation to be stockholders, but also to every owner of stock, legal or equitable, although the same may be on such books in the name of another person, but shall not apply to a person who may hold the stock as collateral for the payment of a debt. (1925, c. 121, s. 1.)

**§ 225 (p). Executors, trustees, etc., not personally liable.**

Persons holding stock as executors, administrators, guardians, or trustees shall not personally be subject to any liabilities as stockholders, but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be if living and competent to hold stock in his own name. (1925, c. 121, s. 2.)

**§ 225 (q). Transferrer, not liable, when.**

No person who has, in good faith and without intent to evade his liability as a stockholder, transferred his stock on the books of the corporation to any person of full age, previous to any default in the payment of any debt or liability of the corporation, shall be subject to any personal liability on account of the nonpayment of such debt or liability of the corporation, but the transferee of any stock so transferred previous to any default shall be liable for any such debt or liability of the corporation to the extent of such stock, in the same manner as if he had been such owner at the time the corporation contracted such debt or liability: *Provided*, that no transfer of the shares of stock of an insolvent State bank, made within sixty days prior to its suspension, shall operate to release or discharge the assignor thereof, but shall be prima facie evidence that such stockholder assigned the same with knowledge of the insolvency of such bank and with an intent to evade the liability thereon. (1925, c. 121, s. 3.)



**§ 225 (r). Stock sold if subscription unpaid.**

Whenever any stockholder, or his assignee, fails to pay any installment on the stock, when the same is required by law to be paid, the directors of the bank shall sell the stock of such delinquent stockholder at public or private sale, as they may deem best, having first given the delinquent stockholder twenty days notice, personally or by mail, at his last known address. If no party can be found who will pay for such stock the amount due thereon to the bank with any additional indebtedness of such stockholder to the bank, the amount previously paid shall be forfeited to the bank, and such stock shall be sold, as the directors may order, within thirty days of the time of such forfeiture, and if not sold, it shall be canceled and deducted from the capital stock of the bank. (1925, c. 121, s. 4.)

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**CHAPTER 6****BASTARDY****§ 267. Woman declaring father; issue of paternity; appeal.**

**Promise of Father to Support Child.**—Where the mother of a bastard child has refrained from enforcing maintenance thereof under this section, this will constitute consideration to support an action on a promise of the father to support and educate it. *Thayer v. Thayer*, 189 N. C. 502, 127 S. E. 553.

**§ 273. Allowance and bond.**

**Constitutionality.** — Proceedings in bastardy for an allowance to be made to the woman are civil and not criminal, for the enforcement of police regulations, and this section as amended in 1921, raising the jurisdiction of the justice of the peace to an amount not exceeding two hundred dollars, is not contrary to the provisions of our Constitution, Art. IV, sec. 27. *Richardson v. Egerton*, 186 N. C. 291, 119 S. E. 487. See note of this case under Const. Art. IV, § 27.

**§ 278. Effects of legitimation.**

**The plain intent and language** of section 185 and this section is that a child so adopted, or legitimated, shall inherit his father's real estate, and be entitled to the personal estate of his father "in the same manner as if it had been born in lawful wedlock." *Love v. Love*, 179 N. C. 115, 116, 101 S. E. 562.

"The word 'only' as used in this statute qualifies the words 'inherit from the father,' and not the words 'real estate,' thereby limiting the right of inheritance to the properties of the adopting father, and this is emphasized by the fact that the remaining part of the sentence provides that the adopted child is also entitled to the personal estate of his father." *Love v. Love*, 179 N. C. 115, 117, 101 S. E. 562.

**§ 279. Legitimation by subsequent marriage.**

**How Shown.** — Where one claims lands of his father by descent by reason of the subsequent marriage of his parents, the child so born is recognized as legitimate for the purpose of inheriting, and this may be shown by evidence of the declarations of the parents, or by family tra-

ditions ante litem motam, this being an exception to the rule excluding hearsay evidence. *Bowman v. Howard*, 182 N. C. 662, 110 S. E. 98.

**Who May Contest Constitutionality.**—Only those who would inherit, or have a vested right in the lands, may contest the constitutionality of this section, providing that a child born out of wedlock may inherit from her father who thereafter married the mother of the bastard. *Bowman v. Howard*, 182 N. C. 662, 110 S. E. 98.

**"Reputed Father."**—In *Bowman v. Howard*, 182 N. C. 662, 666, 110 S. E. 98, the Court said:—"No contention as to the statute was made by the defendant except as to the construction of the words 'reputed father,' which the defendant contended should be construed to mean 'actual father.'" The exception is not meritorious. The word 'reputed' means considered, or generally supposed, or accepted by general or public opinion."

In *Bowman v. Howard*, 182 N. C. 662, 666, 110 S. E. 98, it was said:—"In *McBride v. Sullivan*, 155 Ala. 174, *Simpson, J.*, says: 'The use of the word "reputed" was intended merely to dispense with absolute proof of paternity, so that, if the child is "regarded," "deemed," "considered," or "held in thought" by the parents themselves as their child, either before or after marriage, it is legitimate.'"

## CHAPTER 7

### BILLS OF LADING

#### ART. 3. OBLIGATIONS AND RIGHTS OF CARRIERS UPON BILLS OF LADING

##### § 290. Obligation of carrier to deliver.

See note to § 313.

#### ART. 4. NEGOTIATION AND TRANSFER OF BILLS

##### § 313. Rights of person to whom a bill has been negotiated.

**In General.**—The person to be notified on shipment to order of consignor has, under our statute, this section, title for the purpose of a suit to recover damages and the statutory penalty, as fully as if the carrier had contracted with him direct, upon the presentation of the bill of lading properly endorsed and his tender thereof in good faith to the carrier, the statute being remedial of the common law that there was no contractual relation between him and the carrier that would permit recovery for causes accruing before he had paid the draft, and had the bill of lading assigned to him. *Watts v. Norfolk Southern R. Co.*, 183 N. C. 12, 110 S. E. 582.

## CHAPTER 8

### BONDS

#### ART. 3. MORTGAGE IN LIEU OF BONDS

##### § 346. Mortgage in lieu of bond required to be given.

**Failure to Record.**—The mortgage or deed in trust permitted by this section, to be given in lieu of an official bond, is, as to proper registration, to be regarded as a mortgage, or deed in trust, and accordingly registered as the law requires, construing the statute strictly, as required; and its entry upon the records in the clerk's office as a bond, alone without recording it in its proper place as a mortgage, is insuffi-



cient to give notice to, or priority of lien, over a deed of a subsequent purchaser of the land. *Hooper v. Tallassee Power Co.*, 180 N. C. 651, 105 S. E. 327.

### § 348. Cancellation of mortgage in such proceedings.

Any mortgage given by any person in lieu of bond as administrator, executor, guardian, collector, receiver or as an officer required to give an official bond, or as agent or surety of such person or officer, or in lieu of bond or undertaking or recognizance for his appearance at any court in any criminal proceeding, or for the security of any cost or fine in a criminal action which has been registered, when such party as administrator, executor, guardian, collector, or receiver has filed his final account and when the time required by statute for the bond given by any administrator, executor, guardian, collector, or receiver to remain in force for the purpose of action thereon has expired, or when the officer required to give an official bond has fully complied with the conditions of such bond and the time within which suit is allowed by law to be brought thereon has expired, or when the person giving such mortgage in lieu of bond has made his appearance at the court to which he was bound and did not depart the court without leave, or paid the cost or fine required, may be canceled or discharged by the clerk of the Superior Court of the county where such action was pending or where the mortgage in lieu of bond is recorded by entry of 'satisfaction' upon the margin of the record where such mortgage is recorded in the presence of the register of deeds, or his deputy, who shall subscribe his name as a witness thereto, and such cancellation shall have the effect to discharge and release all the right, title and interest of the State of North Carolina in and to the property described in such mortgage. (Rev., 267, 1905, c. 106; 1921, c. 29, ss. 1, 2; 1925, c. 252, s. 1.)

**Editor's Note.**—The Act of 1925 aside from contributing to this section the seventh to the fourteenth lines, omitted the last phrase of the section providing for validation of the acts of the superior court clerks in canceling and satisfying mortgages, etc. It is now found in section 348(a).

### § 348 (a). Validating statute.

All acts heretofore done by the several Superior Court clerks, canceling or satisfying any mortgage, or other instruments, herein mentioned and specified are hereby validated: *Provided*, this provision shall not affect vested rights nor litigation pending March first, one thousand nine hundred and twenty-five. (1925, c. 252, s. 2.)

## ART. 4. ACTIONS ON BONDS

### § 354. On official bonds injured party sues in name of state; successive suits.

**Liability of Surety Cumulative.** — Where the surety has renewed the bond of a clerk of the court upon his election to that office a second time, acknowledged its liability and received premiums thereon, its liability is cumulative for all defalcations thereunder, whether for the

second term its principal was continuing to act *de facto* or *de jure*. *State v. Martin*, 186 N. C. 127, 118 S. E. 914.

Under the facts of the case under consideration it was held error for the trial judge to exclude liability of the surety upon the defendant's second bond, the statute giving the plaintiff the right to sue from time to time until the full penalty incurred under both of the bonds is recovered, limited solely by the amount of the bonds, etc., when incurred thereunder, though the incumbent may have held only under color of his office; and a judgment denying liability upon the ground that the incumbent was "a hold-over" from his preceding term, is reversible error. *State v. Martin*, 186 N. C. 127, 118 S. E. 914.

### § 357. Officer unlawfully detaining money liable for damages.

**Liability of Surety.**—While, as against the principal on the bond of a clerk of the Superior Court, interest under our statute at the rate of 12 per cent is collectible from the time of defalcation, the amount of the penalty on his bond determines the liability of the surety thereon. *State v. Martin*, 188 N. C. 119, 123 S. E. 631.

## ART. 5. BOND-ISSUING DISTRICTS INCORPORATED

### § 360. Various districts issuing bonds incorporated.

**In General.**—Under our statutes, in general terms, relating to special school districts, apparently all of them within the State are incorporated and given powers and duties in reference to the issue and payment of bonds for school purposes, by the board of trustees, when approved by the voters of the particular district upon an election duly held for the purpose; the term name called, this section; Laws 1921, chs. 244 and 133; and where two special school districts having equal rate of taxation, have been consolidated under the provisions of C. S., 5469 et seq.; Laws 1921, ch. 179, sec. 1; such district so consolidated may issue valid bonds for the purpose stated, when it has complied with the appropriated statutes. *Paschal v. Johnson*, 183 N. C. 129, 110 S. E. 841.

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## CHAPTER 9

## BOUNDARIES

### § 361. Special proceedings to establish.

**No Estoppel by Judgment of Clerk.**—The clerk of the Superior Court, under Ch. 9, C. S., controlling proceedings to determine a dividing line, has no jurisdiction as to title or character of the possession of the claimants on either side of the dividing line of lands authorized to be ascertained or determined by him under the provisions of this section, the occupancy alone being sufficient to confer jurisdiction, under this section; and where the clerk has acted within his jurisdiction in such proceedings, his judgment may not estop a party in a separate action to show the character or extent of his possession, or to establish an easement by adverse possession in the lands occupied by the other. *Nash v. Shute*, 182 N. C. 528, 109 S. E. 353.



## CHAPTER 12

## CIVIL PROCEDURE

## Subchapter I. Definitions and General Provisions

## ART. 1. DEFINITIONS

## § 393. Special proceedings.

See *Jacobi Hardware Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756.

## Subchapter II. Limitations

## ART. 3. LIMITATIONS, GENERAL PROVISIONS

## § 404. When actions commenced.

See notes to § 160.

**Jurisdiction in Actions in Personam Acquired.**—In *Hatch v. Alamance Railroad Co.*, 183 N. C. 617, 112 S. E. 529, it was said:—"An action is commenced as to each defendant when the summons is issued against him but, in actions in personam jurisdiction of cause and of parties litigant can be acquired only by personal service of process within the territorial jurisdiction of the court, unless there is an acceptance of service or a general appearance, actual or constructive. *Bernhardt v. Brown*, 118 N. C. 701, 24 S. E. 527, 715; *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978; *Warlick v. Reynolds*, 151 N. C. 606, 66 S. E. 657, 21 R. C. L., 1315."

**Effect of Federal Transportation Act.**—The Federal Transportation Act, placing railroads, etc., under Government control as a war measure during the war with Germany, and the later act releasing them therefrom, did not interfere with the commencement or the prosecution of actions in the State courts between citizens of the same or different States to recover damages for a breach of contract for the sale of goods; the later act expressly limiting the time to two years thereafter; and an action of this character arising during war control is barred by our State statute of limitations after three years from the time of its accrual. *Vanderbilt v. Railroad Co.*, 188 N. C. 568, 125 S. E. 387.

## § 406. Deemed pleaded by insane party.

**Orders within Discretion of Court.**—"This section gives the court discretion at any time before the action is finally disposed of to order or bring in by proper notice one or more of the near relatives or friends of the insane person, and may make such other order as it deems necessary for a proper defense." *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 392, 122 S. E. 1.

## § 407. Disabilities.

**Editor's Note.**—Although there is no direct construction of this section in the majority opinion of the case from which the two following paragraphs are taken, it is thought that the constructions in the dissenting opinion will be of some help to the searcher.

**Inheritance-Action by Minors.** — In *Clendenin v. Clendenin*, 181 N. C. 465, 472, 107 S. E. 458. Clark J., dissenting, said: "But even if the casting of the inheritance, as to one-half interest of the plaintiffs, who were then minors, could have had the effect to suspend the running of the statute, even then they would have had only three years in which to have brought this action after the disability was removed by the

coming of age of each—the youngest of the plaintiffs became of age in December, 1912.”

**Same—Adverse Title.**—In *Clendenin v. Clendenin*, 181 N. C. 456, 472, 107 S. E. 458. Clark, J., dissenting, said: “If the defendant’s title under color of possession and 7 years possession thereof under such color did not bar this action, then certainly he was in possession from 10 February, 1896, holding, according to the evidence on both sides, sole and absolute possession, claiming adversely to Jane and J. D. Click and all the world, under known and visible metes and bounds, for 20 years, and his title ripened under that statute on 10 February, 1916. And even if the running of such title was suspended at death of defendant’s grantors by the minority of the plaintiffs, they were entitled only to three years after the disability was removed to bring this action.”

**Insane Claimant.**—C. S., 412, prescribing a time limit within which actions, may be commenced against administrators or executors of the decedent’s estate, commences to run against an insane claimant only from the time of the qualification of his guardian. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

### § 408. Disability of marriage.

**In General.** — Under the provisions of this section, and sections 454, 2606 et seq., passed in pursuance of Article X, section 6, of our State Constitution, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions as if they were unmarried; and by suing alone the wife may recover not only her earnings for personal service, but damages sustained by her in consequence of personal injury or other tort. *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9.

**In a suit to cancel the deeds** to the locus in quo, because of the mental incapacity of the grantor to make them, and under which the defendant in possession claims title by adverse possession under color, it was held that the coverture of the plaintiff will not avail her to repel the bar of the statute of limitations, which has run in favor of the defendant’s title. *Butler v. Bell*, 181 N. C. 85, 106 S. E. 217.

### § 411. Defendant out of state; when action begun or judgment enforced.

**Judgment “In Personam” Invalid.**—Where a nonresident of this State has had no personal service of summons made upon him and has not accepted service, and has no property herein subject to attachment or levy, a judgment upon publication of service under the provisions of this section, may not be rendered against him in personam, in an action for debt; and where so rendered it will be set aside upon special appearance of his attorney who moves therefor upon the ground of improper service, and the want of jurisdiction of our courts. *Bridger v. Mitchell*, 187 N. C. 374, 121 S. E. 661.

### § 412. Death before limitation expires; action by or against executor.

**In General.**—This section is an enabling statute, intending to enlarge to that extent the time within which the action may be brought, and not to suspend the operation of the statute, which continues to run. *Irvin v. Harris*, 184 N. C. 547, 114 S. E. 818.

**Time for Suit Fixed by Contract.**—“It is established by the clear weight of authority that the parties to a contract of shipment may fix a given time, shorter than that allowed by the general statute of limitations within which suit for a breach of the contract shall be brought, and, in the absence of any unusual or extraordinary circumstances,



such a stipulation will be enforced, if not unreasonable. *Thigpen v. East Carolina Railway*, 184 N. C. 33, 35, 113 S. E. 562.

A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods, as to the time wherein suit may be brought for loss or damage, is a part of the contract between the parties, and being made without exception, is not suspended by our State statute, this section providing that "in case a person dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, and action may be commenced by his representatives after the expiration of that time, and within one year from his death." *Thigpen v. East Carolina Railway*, 184 N. C. 33, 113 S. E. 562.

**Insane Claimant.**—This section, prescribing a time limit within which actions, may be commenced against administrators or executors of the decedent's estate, commences to run against an insane claimant only from the time of the qualification of his guardian. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

**Claim against Deceased Partner.** — Where a member of the firm has died and the surviving partners take in his devise and form a new concern assuming the debts of the old, claims against the deceased as a member of the old concern which have been barred by the statute of limitations since the decedent's death, are suspended by the express provision of the statute until an additional period of one year from the qualification of his administrator if within the period of ten years from the decedent's death, and until the expiration of this further time of one year, the bar of the statute will be repelled. *Irvin v. Harris*, 182 N. C. 656, 109 S. E. 871.

Payment made by surviving partner does not repel the bar of the statute as to the separate property of the deceased one, the authority being in the personal representative of deceased persons. The statute is suspended for year after qualification of administrator, within ten years from decedent's death. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

**Suit on Note.**—In *Irvin v. Harris*, 182 N. C. 656, 661, 109 S. E. 871:—The Court said: "In *Geitner v. Jones*, 176 N. C. 544, 97 S. E. 494, the note in suit, which the record shows was not under seal, fell due 18 June, 1912; the debtor died 1 August, 1913; his personal representative was appointed 4 August, 1917. It was held that since the debtor had died before the expiration of the time limited for the commencement of the action, the plaintiffs were entitled to institute the action within one year after the issuing of letters testamentary or of administration, because the letters had been issued within ten years after the death of the debtor."

**Action by Insurer—Noncontestible Policy:** — This section extending the time for commencing action in certain instances does not apply to the period in which the insurer is required to bring action to invalidate a noncontestible policy of life insurance after the death of insured and beneficiary being alive. *Hardy v. Phoenix Mut., etc., Ins. Co.*, 180 N. C. 180, 104 S. E. 166.

## § 413. Time of stay by injunction or prohibition.

**Contract of Parties Not Affected.**—This section as its terms clearly import, affects, and is intended to affect only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. *Gatewood v. Fry*, 183 N. C. 415, 418, 111 S. E. 712.

Where it appears that a purchaser of timber standing upon the land would have cut and removed the same within the time specified for that purpose, except for an injunction erroneously issued in the suit of the plaintiff: this section does not have the effect of extending the per-

iod of time for cutting and removing the timber fixed by the terms of the contract, and the defendant's damages, arising or growing out of the same transaction, may be pleaded as a counterclaim, and it is permissible to ascertain and award the same, to the time of the trial, it being the full net value of the timber, of which he has been deprived. *Gatewood v. Fry*, 183 N. C. 415, 111 S. E. 712.

### § 415. New action within one year after non-suit, etc.

**Where Section Not Applicable.**—Where there is evidence in support of defendant's counterclaim that she had rendered services to her mother, in the latter's lifetime, under an express promise to pay for them, and that her mother had died without property, except her home place, which continued to remain in the defendant's possession after her death; and that the plaintiff was the grantee of her brother, who had obtained the locus in quo by a fraudulent deed from his mother of which the defendant had full knowledge, or actual or constructive notice thereof, the fact that more than one year had elapsed before the beginning of the present action, from the termination by nonsuit of the defendant's action to recover for such services from the administrator of her mother, does not bar her recovery upon her counterclaim, the same being of an equitable nature to which this section has no application, under the facts of this case, the defendant having, all the time, had continuous possession of the land. *Shell v. Lineberger*, 183 N. C. 440, 111 S. E. 769.

**Failure to Pay Costs in Original Action.**—While, ordinarily, the plaintiffs' cause of action upon simple contract will be barred by the statute of limitations from three years after its accrual, and if nonsuit within that period, from one year thereafter, conditioned upon the payment of the cost in the original action, it may be shown by plaintiff that his failure to pay these costs before commencing his second action upon the same contract was caused by the failure or the delay of the clerk of the Superior Court to let him know the amount thereof though the plaintiff had urgently and continuously requested it, and that he would have promptly paid them according to the provisions of the statute had he been able to ascertain them. *Hunsucker v. Corbitt*, 187 N. C. 496, 122 S. E. 378.

The one-year period extended for the bringing of another action after nonsuit upon the same subject-matter, is applicable only when the costs in the original action have been paid by the plaintiff before commencement of the new suit, unless the original suit was brought in forma pauperis; and where the appropriate statute has been pleaded and its time expired both before the bringing of the new action and the payment of the cost in the original one, the second action is barred though commenced within the one-year period, when the original case has not been brought in forma pauperis. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

**When Parol Testimony Is Admissible.**—In an action to recover land parol testimony that a prior action brought without filing a complaint is identical with the present action is inadmissible. *Young v. Atlantic Coast Line R. R. Co.*, 189 N. C. 238, 126 S. E. 600.

### § 416. New promise must be in writing.

**Common Law Applicable to Payments of Principal or Interest.**—This section expressly excepts from its provisions the effect of any principles or interests, thereby leaving as to such payments the principles obtaining at common law before the enactment of the statute. *Kilpatrick v. Kilpatrick*, 187 N. C. 520, 122 S. E. 377.

**New Note Sufficient.**—A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the operation of this section, and re-



peal the bar of the statute of limitations. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

**Effect of Credit Agreement.**—When the running of the statute of limitations would otherwise bar an action upon an account, and there is evidence tending to show a credit thereon was agreed to by the creditor and debtor within the three-year period, and accordingly given, the effect of this credit to repeal the bar relates to the time of the agreement made and effected; and an instruction that made it depend upon the time of the debt incurred for which the credit was given, is reversible error to the plaintiff's prejudice. *Kilpatrick v. Kilpatrick*, 187 N. C. 520, 122 S. E. 377.

### § 417. Admission by partner or co-maker.

**Payment Made by Surviving Partner.**—Where a new partnership is formed after the death of a partner under a partnership arrangement between the survivors and the devisee of the deceased, assuming to pay the debt and obligations of the old concern, a payment made by the surviving partner on a debt of the old concern will not have the effect of repelling the bar of the statute of limitations which would otherwise run against the partnership assets and the separate property of the deceased member of the firm, for upon the dissolution of the partnership by death, this authority ceases in the surviving partner, and becomes vested in the personal representative of the deceased one. *Irvin v. Harris*, 182 N. C. 656, 109 S. E. 871.

### § 421. Action on open account.

**Effect of Conflicting Evidence as to Item.**—To bar an action to recover for goods sold and delivered under the provisions of this section, the two accounts must be mutual or reciprocal, open or continuous, and current, or no time limit fixed by agreement, express or implied, with the balance to be determined by an adjustment of credit and debit; and when there is conflicting evidence as to whether the item sued on was related to other items upon which the defendant relied it is reversible error for the judge to direct a verdict thereon if the jury believe the evidence. *McKinnie Bros. v. Wester*, 188 N. C. 514, 125 S. E. 1.

## ART. 4. LIMITATIONS, REAL PROPERTY

### § 426. Possession presumed out of state.

**Purpose of Statute.**—It is well recognized that, in actions of this character, a litigant on whom rested the burden of the issue, suing for a small piece of land, with a view only of showing title out of the State, was called on to establish the location of some old grant, often of much larger boundary. Ancient of date, with the witnesses who could speak directly to the facts dead, many of the marks and monuments of boundary destroyed or obliterated, it was an effort entailing such cost and expense, and not infrequently threatening a miscarriage of justice, and this when it was fully understood that, if a *prima facie* case was established and the adversary required to offer proof, he too would insist on the position that title was out of the State. To remove this burdensome and untoward condition, the Legislature has enacted this most desirable statute providing that, in actions between individual litigants, title should be conclusively presumed to be out of the State. *Moore v. Miller*, 179 N. C. 396, 398, 102 S. E. 627.

**Burden of Showing Title.**—There is no presumption from this section in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. *Moore v. Miller*, 179 N. C. 396, 399, 102 S. E. 627.

### § 427. Such possession valid against claimants under state.

**Remainderman.**—The statute of limitations will not ordinarily begin to run against the remainderman until the falling in of the life estate, or until he becomes of legal age. *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 690.

### § 428. Seven years possession under colorable title.

**An unregistered deed** is not valid color of title as against judgment creditors of the grantor. *Eaton v. Doub* (N. C.), 128 S. E. 494.

**A grantee who has acquired a voidable title** to lands under sufficiently colorable deeds, may ripen his defective title into a good one by sufficient adverse possession thereunder, which is a distinct or separate source of title from one under which he had entered possession of the lands. *Butler v. Bell*, 181 N. C. 85, 106 S. E. 217.

**Adverse Claimant With Notice.**—Where a voidable but colorable deed to lands reserving a life estate has merged under a second and voidable deed conveying the title in fee without reservation, and such right has been acquired by a subsequent purchaser of the lands, equity will not permit an adverse claimant with notice to sleep upon his right until the purchaser has acquired title by sufficient adverse possession under the color of his deed, and then successfully assert his right. *Butler v. Bell*, 181 N. C. 85, 106 S. E. 217.

**Effect as to Notice.**—The possession of one under color of title is notice of his claim of title to the lands. *Butler v. Bell*, 181 N. C. 85, 106 S. E. 217.

**The question of color of title to lands** does not arise when the character of the possession of the claimant is not sufficient to ripen a perfect title in him. *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458.

### § 429. Seizin within twenty years necessary.

**Occupation Must Be Adverse.**—The use and occupation of land is not alone sufficient to confer title on the occupant, the presumption being that the title is in the true owner; and the statute will only ripen the title of the occupant when it has been adverse for the statutory period; that is, open, continuous, notorious, and hostile to the true owner, and evidenced by such unequivocal acts as will put the true owner on notice of the claim. *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458.

**Husband on Land of Mother-in-law.**—The husband moved with his wife upon the lands of her mother, and continued thereon with her and their children to the death of his mother-in-law and of his wife, who inherited the lands from her, and cultivated them without giving clear, definite, or unequivocal notice of his intention to exert exclusive ownership: It was held that the character of the husband's possession was affected by the relationship of the parties, and this possession was subordinate to the superior title, inherited by his children from their mother, and could not ripen a perfect title in him. *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458.

### § 430. Twenty years adverse possession.

**Deed from Tenant in Common.**—To ripen title to lands under a deed from a tenant in common adverse possession for twenty years is necessary, and this applies to one to whom the alien of a tenant has attempted to convey the entire estate. *Bradford v. Bank*, 182 N. C. 225, 108 S. E. 750.

**Life Estate.**—In *Clendenin v. Clendenin*, 181 N. C. 465, 472, 107 S. E. 458, Clark J., dissenting, said: "It is true the statute says: 'Such possession so held gives a title in fee to the possessor,' but this is not prohibitive of acquiring a lesser estate by color of title and possession. 'A life estate may be acquired by adverse possession.' 1 A. & E. (2 ed.),



809, and cases cited. There is no reason why if adverse possession under color can ripen a fee simple, it should not be valid to the extent of a lesser estate when claimed by the party in possession for the prescribed length of time. 'Actual, open, visible possession of land is adverse' to the owner. *Patterson v. Mills*, 121 N. C. 258, 28 S. E. 368; *Malloy v. Bruden*, 86 N. C. 251."

**Claim to Timber—What Plaintiff May Show.**—Where the plaintiff claims timber growing upon lands by adverse possession of the lands, depending upon whether defendant's boundary was the high or low-water mark of a stream, it is competent for the plaintiff to show the location of the high-water mark, and where the land alleged to have been trespassed upon was situated, and not only what damages had been done to it from the cutting and removing of the trees, but how and to what extent, if any, the remaining land had been injured or depreciated by the defendant's alleged trespass. *Rutledge & Co. v. Griffin Mfg. Co.*, 183 N. C. 430, 111 S. E. 774.

**Where the husband owns or has title to the locus in quo**, his living thereon with his wife in his sole possession, in regard to the question of title ripened by adverse possession, and the principle upon which it is regarded as that of his wife when she owned the title and he claims under a void deed from her, as decided in *Kornegay v. Price*, 178 N. C., 441, does not apply. *Rutledge & Co. v. Griffin Mfg. Co.*, 183 N. C. 430, 111 S. E. 774.

## § 432. Possession follows legal title.

**When Presumption Exists.**—The presumption from the express language of this section will arise and exist only in favor of a claimant who has shown "a legal title," and until this is made to appear the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. *Moore v. Miller*, 179 N. C. 396, 102 S. E. 627. See notes of this case under sec. 567.

## § 435. No title by possession of public ways.

**Title to a Street.**—Prior to the act of 1891, from which this section is derived sufficient adverse possession would ripen the title to a street by its citizen against a municipal corporation. *Lumberton v. Branch*, 180 N. C. 249, 104 S. E. 527.

**Title of Railroad to Open Square.**—An erroneous charge that the title to an open square, dedicated to and accepted by a town, would be acquired by seven years adverse possession under known and visible lines and boundaries, contrary to the provisions of this section, is not cured alone by a full and complete charge on the principles of an offer to dedicate and an acceptance of the square by the town. *Atlantic Coast Line R. Co. v. Dunn*, 183 N. C. 427, 111 S. E. 724.

Where the owner of lands has platted them into streets and a public square, and sold them to various purchasers with reference thereto, who have made improvements on the lots so purchased, and there is evidence that the sale was made in anticipation of the location of a town which was soon thereafter built, and that it had accepted the dedication of the streets and public square so platted; and that the original owner subsequently had conveyed this open square to a railroad company which had continuously used it more than seven years for the purposes of a depot: It was held upon the question of the title of the railroad claimed by adverse possession under the color of its deed, it is reversible error for the judge to charge the jury that should the railroad company, the plaintiff in the action, have held adverse possession under known and visible lines and boundaries, under color, it would ripen its title, such being contrary to the provisions of Laws 1891, ch. 224, this section. *Atlantic Coast Line R. Co. v. Dunn*, 183 N. C. 427, 111 S. E. 724.

## ART. 5. LIMITATIONS, OTHER THAN REAL PROPERTY

## § 437. Ten years.

**Notes in Discharge of Mortgage.**—Where the grantee of a mortgagor of lands has assumed, under a valid agreement, to discharge the mortgage debt, evidenced by notes under seal, the ten-year statute of limitations applies. *Parlier v. Miller*, 186 N. C. 501, 119 S. E. 898.

**Effect of Government Control of Railroads.**—Where, at the time of the conveyance of lands with warranty of title, the paramount title is in the United States Government, the paramount title of the United States was such hostile assertion as amounted to a constructive eviction; and the statute of limitations began to run at the time of the delivery of the deed, and where neither the Government nor the parties have been in actual possession, it is not required that the covenantor or grantee in the deed enter upon the lands as a wrong-doer, and become liable to summary ejection in order to recover upon the warranty. *Cover v. McAden*, 183 N. C. 641, 112 S. E. 817.

The defendant railroad, as lessor of the Southern Railroad Company, was sued in the Superior Court for damages for the alleged negligent killing by its lessee road of the plaintiff's intestate, during the United States Government control of railroads, including the lessee, as a war measure, and without interposing a defense under the Federal statutes and orders of the United States Government, a judgment final was obtained against the defendant in due course and practice of the courts. After the railroad's properties were restored to private ownership under the Federal statutes, the plaintiff brought his action upon the judgment theretofore rendered: It was held that his second action may be prosecuted. *King v. North Carolina R. Co.*, 184 N. C. 442, 115 S. E. 172.

## § 439. Six years.

**Bond of Defaulted Clerk.**—The six-year statute of limitation, this section, is applicable to an action against the surety on the bond of a defaulted clerk of the Superior Court. *State v. Martin*, 186 N. C. 127, 118 S. E. 904.

## § 440. Five years.

**The right of action of a remainderman against railroad to recover lands** accrues upon the death of the life tenant. *Young v. Atl. Coast Line R. R.*, 189 N. C. 238, 126 S. E. 600.

**Recovery by Present Owner.**—The present owner of land may recover of a railroad company, under the provisions of this section, the entire damages to his land caused by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted action therefor before his sale and conveyance of the land thus permanently injured by the trespass. *Louisville etc. R. Co. v. Nichols*, 187 N. C. 153, 120 S. E. 819.

## § 441. Three years.

**Subsection 1—When Statute Begins to Run in General.**—The statute of limitations does not begin to run until the death of the intestate on his contract with the plaintiff, that if plaintiff performed certain services for him during his life he would compensate him therefor in his will. *Smith v. Allen*, 181 N. C. 56, 106 S. E. 143.

Where an employee, injured while engaged in his duty to his employer, has compromised his claim for damages by going back to work in a crippled condition under an agreement that he should receive a living wage for life sufficient for the support of himself and family, and upon breach of the employer of this agreement, has been forced to seek employment



elsewhere, the fact that he has done so, under the circumstances, will not avoid his recovery in his action upon the compromise agreement, and the statute of limitations will begin to run only from the time of the defendant's breach of the contract. *Fisher v. Roper Lumber Co.*, 183 N. C. 485, 111 S. E. 857.

**Same—Jury Question as to Whether Section Applies.**—Where, in an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, the city has pleaded the statute of limitation and set up as a defense the failure of the defendant to notify the city under the terms or provisions of its charter, and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be remanded for a new trial, and upon this appeal it is held that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. *Dayton v. Asheville*, 185 N. C. 12, 115 S. E. 827.

**Subsection 2—Lien of City for Paving.**—The lien given a city or town on the lots of an owner along its streets for paving its sidewalk, rests only by statute, and not by common law, and is enforceable only against the lots, in rem, and not against the owner individually or out of his other property, and to enforce the same action must be commenced within three years next after the completion of the work, or it will be barred by the statute of limitations. *Morganton v. Avery*, 179 N. C. 551, 103 S. E. 138.

**Subsection 4—Burden of Proof.**—Where the three-year statute of limitations is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

**Subsection 6—Section 445 Not Affected.**—C. S., 445, limiting the time for the bringing of an action to ten years, and applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of this section, as to actions on their official bonds. *Pierce v. Faison*, 183 N. C. 177, 110 S. E. 857.

**Subsection 9—Fraudulent Distribution of Dividends.**—This section relating to time to commence action after discovery of fraud, has no application to fraudulent distribution of dividends to shareholders of corporations under the facts of this case. *Chatham v. Realty Co.*, 180 N. C. 500, 105 S. E. 329.

**Same—Fraudulent Conveyance.**—Where the suit is to recover in money the difference between the grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor for the grantee's benefit, and the reasonable value thereof, this section, limiting the action to three years in cases of fraud applies, and it is reversible error for the trial judge to hold, as a matter of law, that the ten years statute relating to actions to impress a trust upon property only was applicable. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185.

An action to set aside a deed to lands on the ground of fraud and mistake, under this section, must be brought within three years next after the cause of action accrued, considered as being when the party aggrieved should have discovered the facts constituting the fraud or mistake relied upon in his suit, and the relief afforded by the statute has a broader meaning than the common-law actions of fraud and deceit and applies to any and all actions, legal or equitable, where fraud is the basis or an essential element in the suit. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185.

It is fraud sufficient to set aside a deed to lands where the weakness of the grantor's mind has been designedly controlled by the influence of another to such an extent as to entirely supplant his will and cause him to make an improvident and harmful disposition of his property that he would not otherwise have made; and where in an action of this character

there is sufficient evidence to establish this fact, it falls within the three year statute of limitations, this section; and a contrary ruling by the trial judge constitutes reversible error. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185.

Where the evidence upon the trial to set aside a deed for fraud practiced upon the grantor is sufficient, under the provisions of this section, and the trial judge has erroneously ruled to the contrary as a matter of law, this reversible error is not relieved by the principle that the statute does not begin to run till the influence has been removed, when it does not appear on appeal that such influence had ever been removed, and the jury have found the issue of fraud without being permitted to pass upon this question. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185.

**Same—When Notice of Fraud Sufficient.**—A testator devised to his executor to hold in trust for his son and his family a certain part of his estate for his son's wife, and then convey the same to his son's child or children, etc. The executor obtained, in proceedings before the clerk, with all the parties represented, an order to sell the testator's land, including that of the trust estate, to pay the debts of the deceased, and conveyances were made by him to the purchasers and registered. In an action alleging fraud on the part of the executor in procuring the lands in trust through third parties bidding at the sale, gross inadequacy of price, etc., it is held, that the proceedings before the clerk to make assets to pay the debts of the deceased, and the open, notorious, and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put the plaintiffs, claiming under the children of the said son, the cestuis que trustent, upon notice of the fraud alleged, if any committed by the executor, and it would bar their right of action within three years therefrom. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623.

**Same—Where Confidential Relation Exists.**—It was held under the facts of the instant case, there were no such confidential relations existing between the plaintiffs and the executor and trustee of their deceased ancestor as would repel the bar of the statute of limitations by reason of the failure of the executor or trustee to disclose the facts of the alleged fraud. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623.

**Same—How Bar of Statute Repelled.**—In order to repel the bar of the statute of limitations by showing action commenced within three years from the discovery of the fraud, and bring it within the provisions of this section, it is incumbent upon the plaintiff to show that he not only was ignorant of the facts upon which he relies in his action, but could not have discovered them in the exercise of proper diligence or reasonable business prudence. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623.

**Same—Nonresidence.**—The nonresidence of a plaintiff, claiming lands here under an allegation of fraud, etc., does not affect the running of the statute of limitations adverse to his demand in his action. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623.

**Same—Fraud in Probate of Will.**—Our statute allowing three years from the time of the discovery of a fraud within which an action thereon must be commenced, applicable to an adversary proceeding between litigants, is not necessarily controlling upon the hearing upon petition before the clerk of the Superior Court to set aside for fraud or imposition on the court, the proceedings admitting a paper-writing to probate as a will; and were it otherwise, it is required that the petitioner show that he could not sooner have discovered the fraud by the exercise of ordinary care, which in the instant case he has failed to do. *In re Will of Johnson*, 182 N. C. 522, 109 S. E. 373.

**Subsection 10—Suit to Remove Cloud.**—In *Price v. Slagle* (N. C.), 128 S. E. 161, 166, the court said: "This three-year statute has been held not to apply when the suit is to remove a cloud, as distinguished from a suit to recover the land sold for taxes from the tax sale purchaser, or his assigns, who are in possession of the lands so sold."



**Same—Action to Recover Taxes Paid for Deceased.**—In an action against the administrator of the deceased where there are two separate causes of action set out, one to recover the value of services rendered the intestate by the plaintiff, and the other to recover taxes paid for him by the plaintiff, it is necessary that the defendant plead the statute of limitations as to the second cause of action in order to avail himself of it as a bar to the plaintiff's recovery thereon. *Smith v. Allen*, 181 N. C. 56, 106 S. E. 143.

### § 442. Two years.

**Mutual Running Account; Bank and Depositor.**—Where the bank, in following an agreement with its depositor, charges an usurious rate of interest upon loans made to him upon a continued series of transactions whereby it received at a certain discount upon the commercial papers of its depositor received by him in the course of his business, but upon which the depositor remained bound, and the collection of which was without trouble to the bank, and the usurious rate was by reason of an agreement that he keep a certain per cent of the money borrowed from the bank on deposit there, the transaction constitutes a mutual running account, and an action for the penalty under our statute is not barred within two years next from the last item therein. *English Lumber Co. v. Wachovia Bank, etc. Co.*, 179 N. C. 211, 102 S. E. 205.

**When Cause of Action Accrues for Usury.**—The cause of action for the penalty for each payment of usury arises immediately and accrues upon the date of the payment. The action to recover the penalty for each usurious transaction is therefore barred under this section, upon the expiration of two years from the date of the payment. *Sloan v. Piedmont Fire Ins. Co.* (N. C.), 128 S. E. 2, 3.

### § 443. One year.

**Diverting Town Funds to Railroad.**—This section is properly restricted to unlawful acts done by a public officer, under color of his office, to the person and property of another, by violence or force, direct or imputed, and does not apply to a breach of official duty in reference to the officials of a town as employees thereof, in wrongfully diverting the funds of the town to a railroad company in acquiring a right of way for it. *Brown v. Southern Railroad Co.*, 188 N. C. 52, 123 S. E. 633.

Where a railroad company, through its agents has participated in the unlawful appropriation of a town's funds, and the railroad accordingly has thereafter been built and is operating over a right of way acquired, the mere fact that the trial court has dismissed the action as to the members of the municipal board participating in the commission of the wrongful act, under the plea of the statute of limitations, this section, the correctness of this ruling not being appealable from, will not likewise or necessarily bar the action against the railroad company, under the same plea, under an alleged privity between them. *Brown v. Southern Railroad Co.*, 188 N. C. 53, 123 S. E. 633.

**Action Against Justice of Peace.**—A summons was issued to recover the penalty against a justice of the peace, for performing the marriage ceremony without the delivery of the license therefor to him, C. S., 2498, within less than a year from the time he had performed it: It was held, the plea of the statute of limitations, this section, could not be sustained. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628.

### § 445. All other actions ten years.

**Not Affected by § 441.**—This section applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of § 441, as to actions on their official bonds. *Pierce v. Faison*, 183 N. C. 177, 110 S. E. 857.

A suit to declare one of the defendants in execution the equitable

**owner of lands** for the purchase of which he has furnished the price and his codefendants trustees, is barred by the ten-year statute of limitations. *Sexton v. Farrington*, 185 N. C. 339, 117 S. E. 172.

**Passive Trust—Action by Children against Trustee.**—Where the testator creates his executor as trustee of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life and then to convey to his child or children," it constitutes an active trust during the life of the son which becomes passive at his death, which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and settled after ten years, especially when the relationship of trustee has been openly repudiated. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623.

**Parol Trust in Favor of Wife.**—When it is established that the wife is entitled to have a deed to lands made to her husband corrected to engraft a parol trust on his legal title in her favor, and both have entered into the possession under the husband's deed, and had continued in such possession to the time of the wife's suit, the judgment creditors of the husband can acquire no equitable rights against the enforcement of the parol trust in favor of the wife, the husband having none, though the decree correcting the husband's deed has been entered after the docketing of the judgments, and the suit has been commenced after the claims of the husband's creditors had become valid, and the statute of limitations cannot apply to the enforcement of the wife's equity. *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32.

**Taking of Land Without Compensation.**—Where, in an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, the city has pleaded the statute of limitation and set up as a defense the failure of the defendant to notify the city under the terms or provisions of its charter, and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be remanded for a new trial, and upon this appeal it is held that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. *Dayto v. Asheville*, 185 N. C. 12, 115 S. E. 827.

**Action of Cotenants to Protect Title.**—Where one tenant in common in possession has obtained for himself the outstanding title to the locus in quo, equity will declare him to have purchased for the benefit of the others, to be held in trust for them, and the ten-year statute applying to his possession, this section in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action. *Gentry v. Gentry*, 187 N. C. 29, 121 S. E. 188.

**Alimony—Accrual of Right.**—In proceedings for alimony under the provisions of C. S., 1667, the right of a wife for alimony pendente lite arises to her, in application of the statute of limitations, when the action is commenced, and not from the time of the separation from her husband. *Garris v. Garris*, 188 N. C. 321, 124 S. E. 314. See note of this case under § 1667.

### Subchapter III. Parties

#### ART. 6. PARTIES

#### § 446. Real party in interest; grantees and assignees.

**Past Due Notes.**—In *Guthrie v. Moore*, 182 N. C. 24, 25, 108 S. E. 334, it was said:—"It is admitted in the brief of the defendants that the notes purchased by the defendant Moore and secured by one of the



deeds of trust under which the defendants proposed to sell the lands in controversy, were past due at the time of the purchase, and this being true, the defendant took the notes subject to and with notice of any equities and defenses existing in favor of the plaintiff against Godley, who sold the notes to the defendant Moore, and as against Godley, the plaintiff has the right to rely upon the agreement that the prior liens created by the deed of trust to secure the notes to Patrick and Moore should be paid off and discharged before all of the notes secured in the last deed of trust should be valid obligations against the plaintiff."

**Action of Tenant for Trespass.**—Under the provisions of this section, the court has the power to order the owner of the title to be made a party in his tenant's action of trespass involving an injury both to the possession and to the inheritance. *Tripp v. Little*, 186 N. C. 215, 119 S. E. 225.

**Liability of Directors of Bank to Each Other.**—Where directors of a bank have paid the liability of others under an agreement, each one of them may maintain his action against each of the defaulting members under this section, and such is not a misjoinder of parties prohibited by statute. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316.

**Necessary Parties to Interpretation of Will.**—Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under the writing propounded as the will, are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. *Citizens Bank, etc., Co. v. Dustowe*, 188 N. C. 777, 125 S. E. 546.

Necessary parties to an action concerning the interpretation of a will are barred by their own consent to submit an agreed case, etc., and their acquiescence in a motion made by others, not necessary or proper parties, cannot affect the judgment accordingly rendered by the court. *Citizens Bank, etc., Co. v. Dustowe*, 188 N. C. 777, 125 S. E. 546.

**Conveyance of Land Pendente Lite.**—Where the owner of lands in possession thereof or entitled thereto brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest, under this section, without claim of the right to the possession, under the provisions of the statute of 1893, C. S., 1734; and where issue has been joined, he may if necessary, recover his costs. *Plotkin v. Bank*, 188 N. C. 711, 125 S. E. 541.

**Action of Heirs at Law on Doubtful Claim.**—The trustee in bankruptcy, or the creditors he represents acting with him, may waive a doubtful claim in favor of a bankrupt's estate by having notice thereof in the schedule or otherwise and not pressing the claim for a period of time; and where the trustee has thus proceeded to settle the estate in accordance with the proceedings prescribed by the act, and he has long since been discharged by the court, after having filed his final account, a motion to dismiss the action of his heirs at law as not being the real parties in interest will be denied. This principle especially applies where the deceased and the plaintiffs in action were beneficiaries in trust, the subject of the action. *Cunningham v. Long*, 185 N. C. 613, 125 S. E. 265.

### § 447 (a). Suit for penalty, plaintiff may reply fraud to plea of release.

If an action be brought in good faith by any person to recover a

penalty under a law of this state, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin; whether before action brought or after, shall be in anywise available or effectual. (Code, s. 932; R. C., c. 31, s. 100; 4 Hen. VII, s. 20; Rev., 1521; 1925, c. 21.)

**§ 447 (b). Suit on bonds; defendant may plead satisfaction.**

When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such payment were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded. (Code, s. 933; R. C., c. 31, s. 101; 4 Hen. VII, c. 20; Rev., 1522; 1925, c. 21.)

**§ 447 (c). Sum due with interest and costs, discharges penalty of bonds.**

If at any time, pending an action on any bond with a penalty, the defendant shall bring into court, where the action shall be pending, all the principal money and interest due, and also all such costs as have been expended in any suit upon such bond, the said money shall be deemed and taken to be in full satisfaction and discharge of said bond, and the court shall give judgment accordingly. (Code, s. 934; R. C., c. 31, s. 102; 4 Anne, c. 16; Rev., 1523, c. 21.)



### § 449. Action by executor or trustee.

**Where Judgment Assigned as Security.**—This section applies where a judgment creditor has assigned the judgment as security and in such case an action may be brought by the assignor without joining the assignee. *Chatham v. Realty Co.*, 180 N. C. 500, 105 S. E. 329.

**Holder of a Note as Trustee.**—The trustee of an express trust may sue alone under this section, and where the holder of a promissory note in due course, etc., sues thereon, who as it appears is a trustee of an express trust to collect certain certificates of deposit, and apply the proceeds to its payment for the benefit of himself and the holders of the certificates, a demurrer stating that the plaintiff is, in fact, suing as the agent of the holders of the certificates, and that they are in truth parties, is a speaking demurrer, and bad. *Union Trust Co. v. Wilson*, 182 N. C. 166, 108 S. E. 500.

### § 451. Infants, etc., defend by guardian ad litem.

**Ward Protected by Court.**—Where a guardian ad litem has been duly appointed to represent a party to an action under disability, the court will protect his interest, and though our statute specifies that a summons must be served on such persons, no practical harm would result therefrom to the ward where a guardian ad litem has been appointed, and he accepts the service of the summons and presumably performs his statutory duties; and the proceedings will not be declared void as to the ward when such has been done. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568.

**Return as Evidence of Service.**—Where an infant is the owner of lands sought to be condemned pursuant to this section, such infant must defend by her general guardian, where one has been appointed; and where service of process has been made upon the general guardian, and it appears upon the officer's return of notice that service has been executed upon the infant, such return is sufficient evidence of its service upon the infant to take the case to the jury upon the question involved in the issue. *Long v. Rockingham*, 187 N. C. 199, 121 S. E. 461.

### § 454. Married women.

See notes to § 2513.

**In General.**—Under the provisions of this section and section 2606 et seq. passed in pursuance of Article X, section 6, of our State Constitution, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions as if they were unmarried; and by suing alone the wife may recover not only her earnings for personal service, but damages sustained by her in consequence of personal injury or other tort. *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9.

**Liability of Husband to Wife.**—In *Crowell v. Crowell*, 180 N. C. 516, 522, 105 S. E. 206, it was said:—"So much of the common law as exempted the husband from liability civilly or criminally for assaults, slanders, or other torts or injuries committed by him on his wife is invalid now, both because it has become obsolete and at variance with the customs and sense of right, and with our form of government, which confers 'equality before the law' upon all, and because it has been expressly abrogated and repealed by the statutes above quoted, which confer upon the wife the right to sue and be sued alone, 'when the action is between herself and her husband,' and to recover, suing alone damages for her personal injuries or other torts sustained by her (act 1913, ch. 13, now C. S., 2513) without exempting her husband from such liability."

Defendant contends that section 2513, is not sufficiently inclusive in its terms to extend to a personal injury or tort sustained by one spouse from the other. In reply to this, it may be observed that the right of a

wife to sue her husband, under this section, is not limited by any provision of the statute to actions involving the rights of property only. Hence, considering the two sections together, the court had no difficulty in arriving at the conclusion that the plaintiff's right to maintain this action is an entirely permissible construction. *Crowell v. Crowell*, 181 N. C. 66, 68, 106 S. E. 149.

Under this section a wife may maintain an action against her husband as in assault, for coercing her willfully and maliciously giving her a venereal disease, in which case, punitive as well as compensatory damages may be awarded. *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206.

The defendant driving an automobile with his wife and children is liable in tort for his negligent act which causes his wife a personal injury, in the wife's action against him, the common-law fiction of a merger of the identity of the wife with that of her husband, and that a recovery may not be had by her in view of their relationship, having been changed by our statutes. *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9.

**Section 4158 Applicable to Feme Covert.**—Since the enactment of later statutes fully emancipating a feme covert from her liabilities, the provisions of C. S., sec. 4158, barring the right to caveat a will after seven years, with certain exceptions, apply equally to her. In *re Will of Witherington*, 186 N. C. 152, 119 S. E. 11.

## § 456. Who may be defendants.

**Removal of Cause to Federal Courts.**—A nonresident defendant surety of a contractor for the completion of the building may not remove the cause from the State to the Federal court upon the ground that the resident defendants were not necessary parties to the determination of the controversy. *Morgantown v. Hutton*, 187 N. C. 736, 122 S. E. 842; cited *Bang v. Hester*, 188 N. C. 68, 123 S. E. 308.

## § 457. Joinder of parties; action by or against one for benefit of a class.

**Failure to Join.**—The plaintiff and another entered into a written contract of purchase of defendant's land, sufficient to bind the latter under the statute of frauds, C. S., 988, and the plaintiff alone brought this action, alleging fraud, and seeks to recover back the part payment of the purchase price made thereon by himself and the other person interested, who has not been made a party: It was held, that by action the plaintiff repudiated the contract and renounced his right to specific performance, and such other person having an equitable interest in the subject of the action is a proper party with a right to assert such equity and to have the entire controversy settled in one action. *Kendall v. Phinnix Realty Co.*, 183 N. C. 425, 111 S. E. 705.

**Suit against Unincorporated Society.**—This section permitting the joinder of parties and recognizing representation by common interests, cannot have application to an attempted suit against an unincorporated society, when no individual has been made a party defendant, or appears to defend the action in behalf of himself or other member of the society. *Tucker v. Eatough*, 186 N. C. 505, 120 S. E. 57.

## § 460. New parties by order of court; intervenor.

**In General.**—Amendments by the court to the complaint, and the bringing in of new parties, which merely broadens the scope of the action so as to take in the whole controversy for its settlement in one action, and made without substantial change in the action as originally constituted, do not change the original cause, but are within the contemplation of our statute, and may be allowed by the court. *Lum-*



berman's Mutual Ins. Co. v. Southern R. Co., 179 N. C. 255, 102 S. E. 417.

The general principles as to the law of negligence being the same in each of several actions, a motion for consolidation was properly allowed, with permission to amend the pleadings, and bring in the proper parties under the provisions of our statutes to have all matters of controversy settled in one action, when it can be done without prejudice to the rights of any parties, or to a fair and full trial and consideration of the case. *Lumberman's Mutual Ins. Co. v. Southern R. Co.*, 179 N. C. 255, 102 S. E. 417.

**Where Garnishee a Mere Stakeholder.**—The requirement of C. S., 821, that an issue shall be made up and determined by the jury where the garnishee in attachment denies owing the principal defendant, should be construed with this section, requiring the making of all necessary parties to a full determination of the controversy; and it does not apply when the garnishee takes the position of a mere stakeholder and sets up in his answer that another, not a party to the action, is the owner of the funds attached, and asks that such other person be brought in so as to protect it, the garnishee, in the payment of the funds under an order of the court. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

Where the funds of a nonresident defendant are attached in the courts of this State in the hands of a local bank, an agency for collection only, and the garnishee bank answers, setting forth this fact and claiming absolute ownership in its forwarding bank, and asks that the latter be made a party to the suit, and, in effect, alleging that it, the garnishee, is a mere stockholder without interest in the funds attached; it was held that it is the policy and express purpose of our Code of Procedure that all matters should be settled as far as possible in one and the same action; and the forwarding bank, being a necessary party, the refusal of the court to make it a party was of the substance of the controversy, and constituted reversible error. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

**When New Cause of Action Is Alleged.**—It has been declared to be a fair test, in determining whether a new cause of action is alleged in an amendment, to inquire whether a recovery had upon the original complaint would be a bar to any recovery under the amended complaint; or whether the amendment could have been cumulated with the original allegations. *Lumberman's Mutual Ins. Co. v. Southern R. Co.*, 179 N. C. 255, 260, 102 S. E. 417.

## § 461. Abatement of actions.

The right of action for partition of lands survives the death of the plaintiff. *White v. White*, 189 N. C. 236, 126 S. E. 612.

## Subchapter IV. Venue

### ART. 7. VENUE

## § 463. Where subject of action situated.

As to waiver of venue in suits for divorce, see notes to § 1657.

An action to impress a parol trust upon lands and for an accounting involves a determination of an interest in lands, and the proper venue, under this section, therefor is in the county in which the land is situate, though it may appear that the alleged trustee has conveyed a part thereof to innocent purchasers by proper deed; and upon motion made by him, the cause brought in another county should be transferred as a matter of right. *Williams v. McRackan*, 186 N. C. 381, 119 S. E. 746.

A suit to set aside a deed of trust for lands, and to establish a prior

lien thereon in plaintiff's favor, involves an estate or interest therein, within the intent and meaning of this section. *Henrico Lumber Co. v. Dare Lumber Co.*, 180 N. C. 12, 103 S. E. 915.

**Contract Stipulation Regarding Venue.**—A stipulation in a contract that requires future action thereon if any disagreement should arise, to be brought in certain county wherein one of the parties resides, concerns the remedy created and regulated by this section, the place of venue being within the discretion of the Legislature; and the principles upon which a defendant is deemed to have waived his right, after action commenced, by not demanding in writing in apt time a removal of the cause to its proper venue, has no application. *Gaither v. Charlotte Motor Car Co.*, 182 N. C. 498, 109 S. E. 362.

There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject-matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial thereto in opposition to the will of the Legislature expressed by this section; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified it, will be denied. *Gaither v. Charlotte Motor Car Co.*, 182 N. C. 498, 109 S. E. 362.

**Action Required to Be Brought in County Where Land Situated.**—Where the owner of lands has sold them at public sale, by a plat showing various divisions thereof, and the purchaser of two of them brings suit to set aside the transaction and to cancel certain of his notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land in dispute in one of these lots, without which he would not have purchased, the controversy involves such an interest in the lands as required by this section, to be brought in the county where the land is situated, giving the owner the right to specific performance should he sustain his defense, and on motion aptly and properly made, it will be removed to the proper county when the suit has been brought in another county from that wherein the land is situated. *Vaughan v. Fallin*, 183 N. C. 318, 111 S. E. 513.

## § 467. Foreign corporations.

See notes to § 468.

**Section Pertains to Venue Not Jurisdiction.**—This section is under the subject of venue and not jurisdiction, and, though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed; and under our own decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of our courts or transitory causes of actions. *Ledford v. Western Union Tel. Co.*, 179 N. C. 63, 101 S. E. 533.

## § 468. Actions against railroads.

**Section Pertains to Venue Not Jurisdiction.**—This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina. *McGovern v. Atlantic Coast Line R. Co.*, 180 N. C. 219, 104 S. E. 534.

Where both plaintiff and defendant are corporations, nonresident of the state, an action concerning land brought in a different county from the situs of the property, wherein neither has property, nor conducts its business, the case falls within the intent and meaning of section 467 and this section. *Henrico Lumber Co. v. Dare Lumber Co.*, 180 N. C. 12, 103 S. E. 915.



## § 469. Venue in all other cases.

See notes of §§ 455-460, 470.

**Section Pertains to Venue Not Jurisdiction.** — This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina. *McGovern v. Atlantic Coast Line R. Co.*, 180 N. C. 219, 104 S. E. 534.

**Venue Cannot Be Jurisdictional — Waiver.** — Construing C. S., secs. 469, 470, and 3214, in *pari materia*, venue cannot be jurisdictional, and it may always be waived. Pleading to the merits waives defective venue. Venue is a matter not to be determined by the common law, but by legislative regulation. *Clark v. Carolina Homes (N. C.)*, 128 S. E. 20, 25.

**Action by Unemancipated Illegitimate Child.**—The residence of an unemancipated illegitimate child is, by the construction of law, that of the mother, and the venue of his action by his next friend on a contract made by his mother and father for his benefit is the county of the residence of his mother, though the child may be living with his grandparents at the time in a different county. *Thayer v. Thayer*, 187 N. C. 573, 122 S. E. 307.

**Where Bank and Its Officers Sued Jointly.**—Where in good faith a citizen and resident of one county, sues jointly in tort a national bank located in another county, and its officer, the defendants may not as of right have the cause removed for trial to the county wherein the bank conducts its business. As to whether the Federal statute, entitled "Locality of Actions," provides that the venue must be in the county wherein the bank was located, should the bank have been sued alone, *quere?* Semble, if so, the bank could waive this right. *Curlee v. National Bank*, 187 N. C. 119, 121 S. E. 194.

**Action Brought by Nonresident Plaintiff.**—The county of the residence of the defendant, in an action upon alleged breach of contract, by a nonresident plaintiff, is the proper venue. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

The venue of an action brought by a nonresident of the State in a different county herein from that where the defendants reside or do business, and wherein the defendant has no property, is an improper one. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

**An action to enforce a lien for materials furnished and used in a building** is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of this section, making the venue where the plaintiffs or defendants reside, etc.; and where the venue is improper, the action may nevertheless be proceeded with to judgment, unless demand or a change of venue is made on motion, the failure to do so being a waiver of the right. Where a judgment establishing a lien of this character has been obtained by timely procedure in a different county from that wherein the building is situate, and the defendant debtor has appeared and has entered no objection, upon docketing the judgment in the county of the situs of the property, the court may appoint a commissioner to sell the property in subjection to the lien. Semble, this applies to instances where the statutes specify the venue. *Sugg v. Pollard*, 184 N. C. 494, 115 S. E. 153.

Where a judgment establishing a lien for material furnished and used in a building has been transferred and docketed in the county wherein the building is situated, the mere fact that the entry on the judgment docket in the latter county does not specify this kind of lien is immaterial when the judgment filed therein specifically does so. *Sugg v. Pollard*, 184 N. C. 494, 115 S. E. 153.

## § 470. Change of venue.

**Section Relates to Venue Not Jurisdiction.**—It has been held repeatedly that these statutes, sections 465-470, relate to venue and not jurisdiction, and that if an action is brought in the wrong county it should be removed to the right county, and not dismissed, if the motion is made in apt time, and if not so made, that the objection is waived, and we do not think that section 1657 was intended to change this principle or that it has any such effect. *Davis v. Davis*, 179 N. C. 185, 188, 102 S. E. 270.

**Power of Clerk under § 913a.**—The power to entertain a demand of defendant to remove an action to the proper venue under the provisions of this section, is now conferred by a recent statute (C. S., § 913a) upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon *de novo*. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

**Appeal to Judge.**—Where the clerk of the Superior Court orders the action upon contract removed to the county of the defendant's residence, and the plaintiff, a nonresident, has appealed therefrom to the judge, who in term orders the cause transferred and the defendant has complied with the requisites of the statute in filing a written motion in apt time, the action of the trial judge is a valid exercise of his jurisdictional authority. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598.

**Effect of Failure to Comply with Section.**—The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the provisions of this section, that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

**When Judgment by Default Vacated.**—When a judgment by default final has been entered against a defendant for the want of an answer, and it appeared that the defendant had lodged his motion in apt time, for a change of venue in accordance with the provisions of this section, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days notice of his motion, C. S., 912, before time for answering has expired, will not affect his right to have the judgment by default against him vacated. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

When the defendant has proceeded by motion before the clerk to have plaintiff's action against him removed to the proper county for improper venue, and this before the time for filing his answer has expired, a judgment by default final for the want of an answer is entered contrary to the due course and practice of the courts, and on appeal to the Supreme Court will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

**When Bank and Officer Sued Jointly.**—Under the provisions of C. S., secs. 469, 470 (2), it is within the sound discretion of the trial judge to change the venue of an action sounding in tort, to another, when in his judgment the county in which the action was brought does not best subserve the ends of justice, or when justice would be promoted by the change requested, and upon his findings upon the evidence in this case, it is held, that his discretion in refusing to remove the cause was not



such an abuse thereof as to reverse his judgment on appeal. *Curlee v. National Bank*, 187 N. C. 119, 121 S. E. 194.

### § 473. Additional jurors from other counties instead of removal.

**Discretion of Judge.**—The trial judge, when refusing defendant's motion to remove an action for homicide to another county, may, in the exercise of his sound discretion, have the jurors summoned from any adjoining county, or from any county in the same judicial district, or have jurors drawn from the jury box of such county. *State v. Kincaid*, 183 N. C. 709, 110 S. E. 612.

## Subchapter V. Commencement of Actions

### ART. 8. SUMMONS

### § 475. Civil actions commenced by.

**How Jurisdiction in Actions in Personam Acquired.** — In *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529, it was said:—"An action is commenced as to each defendant when the summons is issued against him (C. S., 404, and this section), but in actions in personam jurisdiction of a cause of parties litigant can be acquired only by personal service of process within the territorial jurisdiction of the court, unless there is an acceptance of service or a general appearance, actual or constructive. *Bernhardt v. Brown*, 118 N. C. 701, 24 S. E. 527; *Vick v. Flournoy*, 147 N. C. 212, 60 S. E. 978; *Warlick v. Reynolds*, 151 N. C. 610, 66 S. E. 657, 21 R. C. L., 1315."

### § 476. Contents; return; seal.

See notes to § 505.

**Historical.**—Under the original Code of Procedure, adopted in 1868, the intention was to simplify and expedite the trial of causes and to reduce the expense of legal proceedings, the most marked features of this new procedure probably were:

1. The abolition of the distinction between law and equity, and between forms of actions, and to provide that there should be only one form of action. Const., Art. IV, sec. 1.

2. The other striking feature of the new procedure was that all summonses should be returnable before the clerk, and that all pleadings should be made up and perfected before him; that when an issue of law is raised an appeal should lie to the judge at chambers, and be promptly acted on by him and returned. And further, that when an issue of fact arose upon the pleadings, and in such cases only, the cause should be transferred to be tried before the judge at term. This eliminated very much delay and expense in legal proceedings, for no cases could be on the docket before the judge at term for trial except those in which issues of fact had been formulated before the clerk by the pleadings. *Campbell v. Campbell*, 179 N. C. 413, 415, 102 S. E. 737. See notes of this case under § 1662.

**Same—The Batchelor Act.**—In *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737, it was said:—"This system has been continued in all the States, unchanged, in which the new procedure had been adopted, it is believed, except in this State. In this State, at that time, our people were much embarrassed by the results of the war, and instead of desiring expedition in the determination of actions there was a desire to put off as long as possible the rendition of judgments for debt. Accordingly, what was commonly known as the 'Batchelor Act,' entitled, 'An act suspending the Code of Civil Procedure in certain cases,' ch. 76, Laws

1868-9, ratified 22 March, 1869, was enacted, which provided that summonses should be made returnable to the term instead of before the clerk. This act provided, sec. 13, that the suspending act should be temporary and in force only 'until 1 January, 1871.' But, owing to the financial conditions of the time, it was later continued indefinitely, and then by oversight, though contradictory to concept and intent of the Code of Civil Procedure (which required all process to be issued returnable before the clerk), it has endured to this time though such anomaly has not obtained, it is believed, in any other State."

**Effect of this Section.**—"The suspending act was discussed in *McAdoo v. Benbow*, 63 N. C. 461, there being a dissent upon the ground that the act was unconstitutional. The statute of 1919, ch 304, (this section) known as the 'Crisp Act,' was intended, as expressed in its title, simply 'To restore the provisions of the Code of Civil Procedure in regard to process and pleadings, and to expedite, and reduce the cost of, litigation.' The suspending act was an anomaly grafted upon the simple and expeditious system of the Code of Civil Procedure, as it was originally adopted here, and as it has continued to prevail in all the other States that adopted it. Such suspension was intended, as stated in the act, to be temporary." *Campbell v. Campbell*, 179 N. C. 413, 416, 102 S. E. 737.

Under the "Crisp Act" (this section) to "restore the provisions of the Code of Civil Procedure in regard to Process and Pleadings and to expedite and reduce the cost of litigation," where advertisement of the summons is required, by implication the time for filing answers is extended to twenty days after the completion of the service by publication; and where this time has not been allowed before judgment, it is an irregularity upon the face of the record which entitles the defendant to have it set aside. *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737.

**Sections 476 and 593 Construed Together.**—In *Young v. Davis*, 182 N. C. 200, 204, 108 S. E. 643, it was said:—"The two acts are not necessarily repugnant, but on the contrary it is clear, we think, that the one is an exception to the other, or rather the first affords an additional and more speedy method of relief in the stated class of suits. We are confirmed also in this view by the fact that the capable codifiers of Consolidated Statutes, and their learned assistants, have incorporated the two statutes of the regular session, 156 and 304, in their valuable work, where they appear in separate sections, this section and 593, not as inconsistent, but as affording two recognized methods of procedure in civil causes and in the cases specified. The legislators at the time they passed the statute of the Special Session were no doubt fully aware that both these laws of the regular session were generally recognized as existent and had been so brought forward in the work referred to, and in restricting the effect of the act of the Special Session in terms to chapter 304, they thereby manifested a clear intent that the special act on moneyed demands in the cases and to the extent specified therein should be undisturbed."

**Omission of Seal from Copy.**—In this case the original summons bore the proper seal and the copy purported to have been attested in like manner. The copy included every material part of the original except the seal, the omission of which, not affecting the substance of the writ, did not impair the efficacy of the service or in any way mislead or prejudice the defendant. In affixing the seal the object is to evidence the authenticity of the summons, but the seal is not a part of the summons in the sense that its impress upon the copy is essential to the validity of the original. *Elramy v. Abeyounis*, 189 N. C. 278, 126 S. E. 743, 744.

## § 482. Service by reading.

**Editors' Note.**—This section seems to be superseded in part by the provision in § 479, Vol. III, allowing service by delivery of a copy in all cases.



### § 483. Service by copy.

**Requirement as to Corporations Mandatory.**—The summons must be served on a corporation by the delivery of a copy thereof to one of certain designated officers or to a local agent; and this requirement, it is held, must be strictly observed. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 621, 112 S. E. 529.

**A foreign express company**, while a member of the Federal Government Control Act, a war measure, does not fall within the provision of this section as to local process agent. *McAlister v. Express Co.*, 179 N. C. 556, 103 S. E. 129.

### § 484. Service by publication.

**Necessity for Averment of Due Diligence.**—"The authorities seem to be decisive that, under our statute as now framed, the allegation that a defendant can not be found in the state, after diligent search, is an essential averment to a valid service of original process by publication." *Sawyer v. Camden Run Drainage District*, 179 N. C. 182, 183, 102 S. E. 273.

The fact that the defendant in an action to whom service of summons by publication is sought is a nonresident, is not a sufficient averment in the affidavit, it being necessary to show that after due diligence he cannot be found within the state, without which the process is fatally defective. *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270.

The Supreme Court has the power to permit an amendment therein to an affidavit made for the publication of a summons; but where the action is for divorce a vinculo, and the defect is in omitting the averment that the defendant cannot after due diligence be found in this state, and it is admitted that the defendant is a nonresident and at the time embraced by the publication, was absent from the state, the Supreme Court may remand the case to the Superior Court to hear and consider the evidence, and the Superior Court Judge, for the purpose of being advised may submit the question to a jury. *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270.

**Order of publication of service of summons in an action by the wife for divorce** is not objectionable as irregular, for the failure of the affidavit to set forth a good cause of action, when there are therein allegations that the husband had abandoned his wife, had left the State after having wrongfully appropriated her separate property to his own use, leaving her without support, and had subjected her to an inquisition of lunacy, and is now professionally engaged in another State upon a good salary, etc.; and this principle also applies to a suit of the wife to recover lands purchased by the husband with her separate money, and title taken in himself without her consent, and in either case publication may be made. *White v. White*, 179 N. C. 592, 103 S. E. 216.

### § 490. Voluntary appearance by defendant.

**Effect of General Appearance.** — In *Ashford v. Davis*, 185 N. C. 89, 116 S. E. 162, the Court said:—"The original service was made on a local agent of the railroad company. W. D. Hines, Director General, appeared in the register's court, defended the action, and appealed from the judgment to the Superior Court. The general appearance waived all defects and irregularities, and would have been sufficient even if there had been no service at all of the summons shown."

"By making a general appearance and filing an answer upon the merits the defendant waived any defect in the service of the summons. The statute provides that the voluntary appearance of a defendant is equivalent to personal service of the summons." *McCollum v. Stack*, 188 N. C. 462, 465, 124 S. E. 864.

**§ 492. Defense after judgment on substituted service.**

**Good Cause.**—Allegations by the movant to set aside a judgment, for irregularity, that he has “a good and meritorious defense,” is but his own opinion, and is insufficient; nor is it aided by erroneous statements of matters of law or of conflicting facts that have been judicially found adverse to his contentions. *White v. White*, 179 N. C. 592, 103 S. E. 216.

**Exception as to Lands Sold in Divorce Proceedings.**—The provisions of this section, as to setting aside judgments against nonresident defendants served by publication, upon motion showing sufficient cause, made within a year after notice, and within five years after its rendition on such terms as may be just, with restitution, etc., does not apply where the lands have been regularly sold under an order of court in divorce proceedings, of which the defendant had notice, to pay the wife alimony which had been allowed her. *White v. White*, 179 N. C. 592, 103 S. E. 216. See note of this case under § 1666.

**Same—Attachment of Lands—Alimony—Notice.**—Attachment of the lands situated here of the nonresident husband, is not necessary to subject it to the payment of alimony regularly allowed the wife pendente lite her suit for divorce, upon publication of summons, or to declare the husband her trustee in his purchase of lands with her separate money, to which he had taken title in himself, without her consent, nor in either case is any notice required beyond publication of summons. *White v. White*, 179 N. C. 592, 103 S. E. 216.

The allegations of the complaint particularly describing the lands situate here of the nonresident husband sought to be subjected to the wife's claim for alimony in her suit for divorce, and the judgment therein directing it to be sold accordingly, practically amount to an attachment of the lands indicated. *White v. White*, 179 N. C. 592, 103 S. E. 216.

**No “good cause is shown”** to set aside a judgment allowing alimony to the wife pendente lite her action for divorce, or in a suit to declare him her trustee in taking title to lands bought with her money and without her consent, where publication of summons has been regularly made under this section, and in proceedings regular upon their face, when the motion has been made after a lapse of nearly five years, the defendant had actual knowledge of the action, and the death of the wife has caused the loss of the evidence upon which the judgments were rendered. *White v. White*, 179 N. C. 592, 103 S. E. 216.

**ART. 9. PROSECUTION BONDS****§ 495. Defendant's, for costs and damages in actions for land.**

**Construed with Sections 509 and 505(4).**—This section, section 509 as amended by the acts of 1921, and section 595(4) are in pari materia with Public Laws of 1921, ch. 92, sec. 1(3), and should be construed together, and the requirements of section 595(4) must be observed that in an action for recovery of real property, or for the possession thereof, the defendant in possession must give bond before answer, unless he has been lawfully excused therefrom or the plaintiff has waived his legal right thereto. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4.

**Same—Power of Superior Court Judge.**—Under the provisions of chapter 92, section 1 (18), Public Laws of 1921, the power of the Superior Court judge to allow amendments to pleadings given by C. S., 547, or to allow answer to be filed, C. S., 536, applying also to the defendant in possession of lands and claiming an interest therein giving bond, this section is not affected. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4.

**A tenant in common** in possession claiming title holds such possession for his cotenants by one common title, and in an action to recover the



lands, he comes within the meaning of this section, and must file the bond therein required, according to law, before answering the complaint. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4.

**Ignorance That Bond Required.**—Ordinarily excusable neglect cannot arise out of a mistake of law, and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, § 509 as amended in 1921, the ignorance of the defendant that he was required to file the bonds, before answer, required by this section, when he is in possession of and claiming title to lands, the subject of the action, is not excusable neglect on his motion to set the judgment aside, and not allowable when it appears that the plaintiff was diligent in insisting upon his rights and has done nothing that could be regarded as a waiver thereof. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4.

**Time in Which to File Bond.**—Where the complaint in an action has not been served with the summons, the defendant has twenty days after its return date in which to answer or demur; and when the defendant is in possession of land, and the action is to recover the lands the defendant has also twenty days, under the circumstances, before pleading, in which to file the bond required, by this section, conditioned upon his paying to plaintiff all costs and damages which the latter may recover, including damages for the loss of rents and profits. *Jones v. Jones*, 187 N. C. 589, 122 S. E. 370.

**Appointment of Receiver Unnecessary.**—In an action to recover real property or its possession, upon the approval of the defendant's bond by the clerk of the Superior Court for continued possession, given under this section, when the defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver, C. S., 860, sec. 1, is not available to the plaintiff, it appearing that a money demand will sufficiently compensate him. *Jones v. Jones*, 187 N. C. 589, 122 S. E. 370.

## ART. 10. JOINT AND SEVERAL DEBTORS

### § 497. Defendants jointly or severally liable.

Where, in an action against a partnership, service of summons has been made on some of the partners but not all, upon a verdict in plaintiff's favor, a judgment is properly entered binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. *Hancock v. Southgate*, 186 N. C. 278, 119 S. E. 364.

## ART. 11. LIS PENDENS

### § 501. Cross-index of lis pendens.

**Breach of Option Contract Not Included.**—An action to recover damages for the breach of an option contract is not an action affecting the title to realty, within this section, and the filing of notice in such case will not affect a purchaser pending that action. *Horney v. Price* (N. C.), 128 S. E. 321.

### § 502. Effect on subsequent purchasers.

**Fraudulent Purchaser of Lands.**—Where the president of a corporation, a substantial owner of its shares of stock, has personally bought in the lands which the company is under a binding contract to convey, before suit brought to enforce the contract, and with full knowledge of the plaintiff's right, taken deed for same from his company, before complaint filed, he and his corporation are concluded from setting up the

doctrine of *lis pendens* as a defense, and his purchase will be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor, for specific performance. *Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389.

**Purchase from Litigant with Notice.**—The doctrine of *lis pendens*, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given pursuant to this section but the principle is not operative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose and the specific property to be affected. *Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389.

## Subchapter VI. Pleadings

### ART. 12. COMPLAINT

#### § 505. First pleading and its filing.

**In General.**—In *Campbell v. Asheville*, 184 N. C. 492, 493, 114 S. E. 825, it was said: "The clause 'otherwise the suit may, on motion, be dismissed' was omitted in the act of 1919, but was brought forward in Consolidated Statutes (sec. 505), and continued in effect until amended at the Extra Session of 1920. Public Laws, Extra Session 1920, ch. 96; Public Laws 1921, ch. 96."

**Clerk Cannot Extend Time for Filing.**—Under the provisions of this section, before those of Public Laws 1921, ch. 304, went into effect, the latter being an act to restore the Code of Civil Procedure in regard to pleadings and practice, and to expedite and reduce the cost of litigation, it was discretionary with the judge of the Superior Court to allow extension of time for the filing of pleadings, and where the complaint in an action had not been filed in the time allowed by law, under the provisions of the former statute, and the later procedure is in effect at the time of the plaintiff's motion for time to file complaint, such motion should be made before the judge, and not before the clerk of the court; and where it has been made before the clerk, and the judge has erroneously held that the clerk has power to extend the time for filing the complaint, the case will be remanded, on appeal, in order that the judge may treat the appeal from the clerk as if the motion had originally been made before him, and pass upon it in the exercise of his sound discretion. *Campbell v. Asheville*, 184 N. C. 492, 114 S. E. 825.

**Not Applicable to Forsyth County.**—The provisions of C. S., 476, this section, and section 509, as to filing pleadings before the clerk of the Superior Court, was to expedite the trial of causes, and has no application to the county court of Forsyth, where, owing to the large volume of business on account of the size and importance of its principal city, the terms of court occur monthly, or oftener. *Union Guano Co. v. Middlesex Supply Co.*, 181 N. C. 210, 106 S. E. 832.

#### § 506. Contents.

**In General.**—Unless the complaint contains "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition pursuant to this section, and the answer contains "a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief," and "a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, courts will be hampered in determining what are the proper issues, both as to form and to number. The principles of good pleading are retained under our present system. *Hunt v. Eure*, 189 N. C. 482, 127 S. E. 593, 596.



### § 507. What causes of action may be joined.

**In General.**—Causes of action may not be united under the provisions of this section, except those for the foreclosure of mortgages, unless they affect all the parties thereto. *Roberts v. Utility Mfg. Co.*, 181 N. C. 204, 106 S. E. 664.

"If the grounds of the bill be not entirely distinct and wholly unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing and tending to one end, if one connected story can be told of the whole, then objection to their joinder cannot apply. *Bedsole v. Monroe*, 40 N. C. 313." *Taylor v. Postal Life Ins. Co.*, 182 N. C. 120, 122, 108 S. E. 502.

**What Constitutes a Dependent Related Claim.**—In an action against a life insurance company and the beneficiaries, to recover upon a policy, the plaintiff alleged that the insured, then deceased, had previously assigned or transferred his policy to him, and the beneficiaries answered, setting up as a cross-action or counterclaim that the plaintiff and deceased had purchased lands in common, and that in their partnership dealings the deceased had assigned the policy upon certain conditions which the plaintiff had failed to perform. The insurance company paid the amount of the policy into court to await the final disposition of this controversy: It was held that the matters alleged in the counterclaim or cross-action were not so unrelated and independent of each other as to make the defendant's pleading defective for multifariousness; and that the matters for adjudication arose out of the same transaction, or series of transactions, making a complete whole, and the plaintiff's demurrer thereto was bad. *Taylor v. Postal Life Ins. Co.*, 182 N. C. 120, 108 S. E. 502.

A contractor sued the owner for the contract price of the building and the latter had the architects made parties and then answered setting up an offset or counterclaim upon allegation that certain damages were caused either by faulty construction or fault of the architects in their plans and specifications, without allegation that the architects in any manner had charge of or participated in the construction of the building, to which the architect demurred upon the ground of misjoinder of parties and causes of action: It was held that a demurrer was good, and a severance of the causes could not be ordered. *Rose v. Fremont Warehouse Co.*, 182 N. C. 107, 108 S. E. 389.

## ART. 13. DEFENDANT'S PLEADING

### § 509. When defendant appears and pleads; time for.

See notes to § 495.

**Presumption as to Filing of Complaint.**—Under the provisions of this section as amended in 1921, it will be presumed on appeal that the complaint in a civil action was filed on or before the return day of the summons, nothing else appearing, according to the time thereof therein specified. *Jones v. Jones*, 187 N. C. 589, 122 S. E. 370.

**Power of Clerk to Remove Cause.**—This section confers no power upon the clerk of the Superior Court to hear and determine a motion to remove a cause to another county, and this must be done before the judge in term; and where the defendant has filed his motion to remove the cause before the clerk, and afterwards filed his answer within the statutory time, the motion is made in time, and the case should be transferred to the Superior Court for a hearing of the motion before the court in term. *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409.

**Extension of Time by Clerk.**—The clerk of the Superior Court in which an action has been commenced has authority, upon request of the defendant, to extend the time for filing the answer beyond the twenty days allowed by this section, but he may not, of his own motion, extend the time without the defendant's consent, beyond that requested, and bar him of his right to move the cause to another county when his motion

is made before answer filed within the twenty days allowed him from the filing of the complaint, though under a misapprehension as to the statutory time he has requested the clerk to allow him two weeks in which to file his answer, the time to which he is entitled by the statute. *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409.

Where a defendant has acted within the time allowed him by law to file his motion to change the venue of the action, and it appears that he has requested the clerk of the Superior Court for an extension of two weeks from the filing of the complaint in which to answer under a misapprehension of the statutory time allowed by this section, the extension of time by the clerk beyond that requested is not upon his application, and the failure of the defendant to specially controvert this upon the argument will not deprive him of his right. *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409.

Where the clerk of the court has entered judgment by default for the want of an answer against one or more of defendants in failing to file answer or demurrer, under the provisions of this section as amended in 1921, the defendants against whom the judgment has been rendered may on appeal apply to the judge for an extension of time. *Brooks v. White*, 187 N. C. 656, 122 S. E. 561.

**Same—When Time Not Extended.**—Where the summons is served with the copy of the complaint, under the provisions of this section as amended in 1921, the clerk of the Superior Court is not given the power to extend the time of the filing of an answer beyond twenty days after the service has been made. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4.

**Same—Not Applicable to Judge.**—This section, as amended in 1921 prohibits the clerk of the court only from extending the time for defendant to answer, and does not impair the broad powers conferred by C. S., sec. 536, upon the judge, to the effect that when the cause is properly before him "he may in his discretion and upon such terms as may be just, allow an answer or reply to be made or other acts done after the time, or by an order to enlarge the time." *McNair v. Yarboro*, 186 N. C. 111, 118 S. E. 913.

Where proceedings are commenced by the issuance of a summons by a nonresident plaintiff in the wrong venue, before the clerk of the court, the defendant may file his motion before the clerk before time to answer has expired, and thereafter file his answer, when the cause will be transferred to term; and the motion to remove then being properly before the judge, he has jurisdiction and authority to pass thereon, and order the case transferred to the proper venue. *Zucker v. Oettinger*, 179 N. C. 277, 102 S. E. 413.

#### ART. 14. DEMURRER

### § 511. Grounds for.

**Want of Proper Service of Summons.**—Where a nonresident defendant wishes to demur to the jurisdiction of the court for the want of proper service of summons on him, he must enter a special appearance for that purpose and confine his demurrer to that objection alone; and where he has entered a general appearance, or demurred on the further ground that the court has no jurisdiction of the subject matter, it is to be taken as a general appearance as to the merits, waiving the objection as to proper service, and he will be bound by the adverse judgment of the court having jurisdiction over the subject-matter of the action. *Dailey Motor Co. v. Reeves*, 184 N. C. 260, 114 S. E. 175.

The intent of the nonresident defendant to enter a special appearance and demur to the jurisdiction of the court upon the ground of insufficient service of summons on him, is ineffectual when it appears that he further denies in his demurrer the jurisdiction of the court over the subject-matter of the action, and thus goes to the merits of the controversy. *Dailey Motor Co. v. Reeves*, 184 N. C. 260, 114 S. E. 175.

**How Objection to Parties Taken.**—In *Lanier v. Pullman Co.*, 180 N.



C. 406, 409, 105 S. E. 21, it was said: "An objection that there are improper parties, as here alleged, cannot be made by motion in arrest of judgment. Where there is a defect of parties, the objection can be taken by demurrer, if the defect appears on the face of the pleadings, and when it does not so appear, the proper pleading in an answer (under this section). An objection to a misjoinder of parties may be taken in the same way. The objection here is that there is a misjoinder and not a defect of parties. Neither can be availed of by a motion in arrest of judgment. 'A defect of parties will be deemed to have been waived, unless taken advantage of by demurrer when such defect appears on the face of complaint, or petition, or by answer when it does not so appear.'"

**Prior Pendency of Another Action.**—A demurrer to a complaint, setting up the prior pendency in another county of an action upon the same subject-matter between the same parties, will be sustained, under this section, and, when such allegations do not so appear in the pleading, objection to the pendency of the second action may be taken by answer. *Allen v. Salley*, 179 N. C. 147, 101 S. E. 545.

### § 516. Division of actions when misjoinder.

See notes of *Rose v. Fremont*, under § 507.

**Misjoinder Both of Parties and Causes of Action.**—Causes of action cannot be divided under this section, when there is a misjoinder both of parties and causes of action, and when there is a cause of action alleged against one defendant assigned by him to one of the plaintiffs, and a breach of a separate contract made by him with both of the plaintiffs, and also a breach of another contract made with one of the plaintiffs, a demurrer thereto for misjoinder of parties and causes of action is good. *Roberts v. Utility Mfg. Co.*, 181 N. C. 204, 106 S. E. 664.

A demurrer will be sustained for a misjoinder of both parties and causes of action in the same action, and a severance thereof is not permissible. *Taylor v. Postal Life Ins. Co.*, 182 N. C. 120, 108 S. E. 502; *Rose v. Fremont Warehouse Co.*, 182 N. C. 107, 109, 108 S. E. 389.

**Same—Illustration.**—An action brought by the wife in which her husband has joined, each independently seeking to recover from the defendant the value of their services separately rendered, upon a quantum meruit, is a misjoinder both of parties plaintiff and causes of action, which will ordinarily be dismissed upon demurrer; but the court may sustain the demurrer and permit the defect to be cured by an amendment and the wife's cause proceeded with upon such terms as it considers just. *Shore v. Holt*, 185 N. C. 312, 117 S. E. 165.

### § 517. Grounds not appearing in complaint.

**Pendency of Another Action.**—A demurrer to a complaint, setting up the prior pendency in another county of an action upon the same subject-matter between the same parties, will be sustained, and, under this section, when such allegations do not so appear in the pleading, objection to the pendency of the second action may be taken by answer. *Allen v. Salley*, 179 N. C. 147, 101 S. E. 545.

### § 518. Objection waived.

A demurrer to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a cause of action, may be entered after answer filed, and the principle upon which it is ordinarily required that the answer be first withdrawn with leave of the court before demurring to the complaint, does not apply. *Cherry v. Atlantic Coast Line R. Co.*, 185 N. C. 90, 116 S. E. 192.

**Where Defense Is in Effect a Demurrer Ore Tenus.**—Where plaintiff filed a verified complaint and defendant did not verify his answer, but appealed from a default judgment on the ground that the complaint did not state a cause of action, the defense is in effect a demurrer ore tenus and must be considered under this section. *Horney v. Mills* (N. C.), 128 S. E. 324.

## ART. 15. ANSWER

## § 519. Contents.

See note of *Hunt v. Eure*, 189 N. C. 482, 127 S. E. 593, under § 506.

**Counterclaim for Less Sum than \$200.**—Where an action on contract has originally and properly been brought in the Superior Court because of an equity involved, or its being for the possession of personal property, the recovery on a counterclaim, in the Superior Court, will not be denied for want of jurisdiction on the ground that the demand thereof was for a less sum than two hundred dollars, the jurisdiction as to matters of counterclaim coming within the provisions of this section and sections 521, and 602. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

**Waiver of Right to Question.**—In a claim and delivery case no complaint being filed, where the defendants file an answer setting up a counterclaim to which the plaintiff offers defenses, the plaintiff waives the right to question the propriety of setting up the counterclaim in such case. *Shearer & Son v. Herring*, 189 N. C. 460, 127 S. E. 519.

## § 521. Counterclaim.

See notes of § 519.

**Purpose of Section.**—This section was intended to authorize the claim and counterclaim to be settled in one action, when there is another contract or a matter "arising out of the same contract or transactions," which could not have been pleaded at common law, but it was not intended to divide into two actions and authorize two suits to be brought upon the same contract or transaction. *Allen v. Salley*, 179 N. C. 147, 149, 101 S. E. 545.

The entire spirit of our code procedure is to avoid multiplicity of actions, and where an action for damages arising by tort from a collision between automobiles has been brought by one of the parties, he may successfully plead the pendency of this action to one brought against him by the opposing party in another county, and have it dismissed, the remedy of the defendant in the second action being by way of counterclaim, pursuant to this section; and that relief may be asked for by each in his own action does not affect the fact that the subject of both actions is the same acts or transactions, to be determined by one judgment either for the plaintiff or defendant in the case. *Allen v. Salley*, 179 N. C. 147, 101 S. E. 545.

**Counterclaim for Independent Tort Not Allowed.**—Under our statutes and decisions construing the same, a counterclaim is not permissible for a distinct and independent tort, and applying the principal, in an action to recover a tract of land alleged to belong to plaintiff, a counterclaim for a trespass by plaintiff on a different tract of land belonging to defendant is not maintainable. *Louisville etc., R. Co. v. Nichols*, 187 N. C. 153, 155, 120 S. E. 819.

**Action on Note by Bank.**—A depositor in a bank may set off amounts due him as deposits in an action by the bank against him to recover on a promissory note. *Graham v. Proctorville Warehouse*, 189 N. C. 533, 127 S. E. 540.

**Right to Take Nonsuit.**—Where the defendant has set up a counterclaim as allowed by this section, as to a cause of action arising on contract, existing at the commencement of the action, and not embraced within the first subdivision of this section, he may, as a matter of right, take a nonsuit thereon at any time of the trial before verdict. *Cohon v. Cooper*, 186 N. C. 26, 118 S. E. 834.

Where the jury have returned their verdict into court upon the issue as to defendant's counterclaim, and as to the others except one to which the judge had held no response was required, the defendant may not take a voluntary nonsuit as to the counterclaim he has set up in his answer. *Cohon v. Cooper*, 186 N. C. 26, 118 S. E. 834.



Where defendant's answer sets up a counterclaim arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of his action, existing at the commencement thereof, it becomes a cross-action, and both opposing claims must be adjusted in the action, and he may not take a nonsuit thereon as a matter of right, without the plaintiff's consent. *Cphoon v. Cooper*, 186 N. C. 26, 118 S. E. 834.

### § 523. Contributory negligence pleaded and proved.

**In General.**—In *Moore v. Chicago Bridge, etc., Works*, 183 N. C. 438, 440, 111 S. E. 776, it is stated pursuant to this section, "where contributory negligence is relied on as a defense, it must be set up in the answer and the defendant is required to prove it on the trial. That is to say, the defendant must properly plead the negligence of the plaintiff as a defense, and he must also assume the burden of proving his allegation of contributory negligence."

**Question for Jury.**—In *Miller v. Scott*, 185 N. C. 93, 116 S. E. 86, the court said: "The defendant argues, that the plaintiff was guilty of contributory negligence which bars his recovery. It will be noted that no evidence was offered at the trial, and that the demurrer relates only to the allegations in the complaint. The plaintiff alleges that on the occasion of the injury he was an inexperienced boy and did not appreciate the risks and dangers incident to mailing the letter; and, moreover, that he was injured not by reason of his effort to reach the train, but through the negligence of the defendant in obstructing the roadway. Under these circumstances the question whether the plaintiff was negligent is to be determined by the jury upon proof offered at the trial."

## ART. 16. REPLY

### § 524. Demurrer or reply to answer; where answer contains a counterclaim.

If the answer contains a counterclaim against the plaintiff or plaintiffs, or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is plead, or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be plead shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim: *Provided*, for good cause shown, the clerk may extend the time of filing such answer or reply to a day certain. If a counterclaim is plead against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served upon the plaintiff or plaintiffs or his or their attorneys of record, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer: *Provided*, for good cause shown, the clerk or judge, in the event the cause shall have been transferred to the civil issue docket, may extend the time to a day certain. (Rev., c. 484; Code, s. 208; 1970-71, c. 42, s. 5; 1919, c. 304; 1921, c. 92, s. 54; 1924, c. 18.)

**Editor's Note.**—The provisions of this section referring to counterclaims are new with the act of 1925. In other cases the time for replying was changed from ten to twenty days, and the right of extending the time was

limited to cases in which the cause has been transferred to the civil issue docket.

**Where Time Extended Not to a Day Certain.**—The clerk made an order extending the time for filing an answer, but not to a day certain as this section requires. Under § 536 it was within the discretion of the trial judge whether the answer should be retained or stricken out. The restrictions in this section do not impair the broad powers conferred by § 536. *Roberts v. Merritt*, 189 N. C. 194, 126 S.E. 513.

### § 525. Contents; demurrer to answer.

**Causes of Action Must Be Consistent.**—In *Berry v. Hyde County Land, etc., Co.*, 183 N. C. 384, 386, it was said: "The defendant insists that the complaint and the replication are inconsistent; that in the former the cause of action is *ex delicto*, and in the latter *ex contractu*; and that the issues submitted by the court relate not to the tort, but to the defendant's alleged breach of contract. At the trial the defendant tendered issues drafted upon allegations in tort, and contends here that the plaintiffs have abandoned the cause of action stated in the complaint and now rely solely upon the replication. It is true, as argued by the defendant, that a party may not be allowed in the course of litigation to maintain radically inconsistent positions, or to state one cause of action in the complaint and in the replication another which is entirely inconsistent."

## ART. 17. PLEADINGS, GENERAL PROVISIONS

### § 528. Subscription and verification of pleadings.

**Delay in moving for judgment on a verified complaint**, no verified answer being filed, is not a waiver of the plaintiff's rights. *Horney v. Mills* (N. C.), 128 S. E. 324.

### § 529. Form of verification.

**When Insufficient.**—A verification to a complaint that the statements therein contained are true, to the best knowledge, information and belief of the plaintiff, save those matters which are stated on information and belief, and as to those he believes to be true, is not sufficient compliance with this section requiring a statement that "the facts set forth in the designated pleadings are true, except those stated on information and belief, and as to those matters he believes them to be true." *McNair v. Yarboro*, 186 N. C. 111, 118 S. E. 913.

**Signature of Verification.**—It is not vitally necessary that a party sign the verification of his pleadings, though the practice that he do so is commended. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612.

### § 534. Items of account; bill of particulars.

**Motion to Make Complaint More Definite.**—Under the provision of this section and section 537, the Superior Court judge may, in his sound discretion, allow defendant's motion, after answer filed, to make the complaint more definite and certain as to the grounds upon which the relief is sought, especially when it affects book records and other written data easily accessible to the plaintiff. *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611.

**Action against Railroad—Summons.** — In an action brought in a justice's court to recover against a railroad company damages for loss of a part of a shipment of goods, the summons is sufficient which includes, in the amount demanded, the freight the plaintiff had paid, in the expression "due by goods lost on company's road," as the freight paid would be as much a loss as the goods, especially when the defendant had had the itemized statement filed by the plaintiff for many months, and failed



to ask for a more definite statement of the claim or for a bill of particulars. *Aman v. Dover, etc., R. Co.*, 179 N. C. 310, 102 S. E. 392.

### § 535. Pleadings construed liberally.

**In General.**—The ancient refinements of pleading more often defeated than promoted justice, and have long since been abolished by statute, §§ 545, 547, 549, 507, 509, 512; and pleading must now be liberally construed, disregarding mere form, to determine their effect. *Aman v. Dover, etc., R. Co.*, 179 N. C. 310, 102 S. E. 392.

In *Chesson v. Lynch*, 186 N. C. 625, 120 S. E. 198, it was said: "The uniform rule prevailing under our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its allegations shall be liberally construed, with a view to substantial justice between the parties. This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it."

**Complaint Overthrown by Demurrer.**—The common law rule that every pleading shall be construed against the pleader has been materially modified by this section whereunder the allegations of a pleading shall be liberally construed with a view of substantial justice between the parties; and a complaint will not be overthrown by demurrer unless it is wholly insufficient to state a cause of action, or unless it appears that the plaintiff has not shown sufficient ground for relief in law or equity. *Sexton v. Farrington*, 185 N. C. 339, 117 S. E. 172.

**Answer Sufficient to Action of Debt.**—Where the complaint alleges an action of debt, an answer denying the debt is held sufficient, under this section. *Chesson v. Lynch*, 186 N. C. 625, applied to the facts of this case. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612.

### § 536. Time for pleading enlarged.

See notes to § 534. See also note of *Battle v. Mercer* under § 495.

**Effect of Section 524 on Power of Court.**—The restrictions in section 524 (C. S. vol.III), do not impair the discretion of the court in allowing an answer to be filed after the time limited. *Roberts v. Merritt*, 189 N. C. 194, 126 S. E. 513.

**Effect of Section 509.**—Section 509 as amended in 1921, prohibits the clerk of the court only from extending the time for defendant to answer, and does not impair the broad powers conferred by this section upon the judge, to the effect that when the cause is properly before him "he may in his discretion, and upon such terms as may be just, allow an answer or reply to be made or other acts done after the time, or by an order to enlarge the time." *McNair v. Yarboro*, 186 N. C. 111, 118 S. E. 913.

**Discretionary Power of Court.**—The trial judge has the discretionary power conferred on him by statute to allow the defendant to file an answer to the amended complaint during the term, and his action will not be reviewed on appeal when an abuse of this discretion has not been shown. *Brown v. Hillsboro*, 185 N. C. 368, 117 S. E. 41.

In passing on a motion to file or verify an answer after the time limit, the court may in its discretion consider the delay of the plaintiff in moving for judgment. *Horney v. Mills* (N. C.), 128 S. E. 324.

Where the plaintiff has waived his right to a judgment by default before the clerk, and the cause has been transferred to the civil-issue docket for trial, the trial judge has the authority, under the provisions of this section to allow the defendant to amend his answer. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612.

### § 537. Irrelevant, redundant, indefinite pleadings.

**Motion to Make Specific.**—Either in a court of a justice of the peace or in the Superior Court an objection to the insufficiency of the pleadings for indefiniteness should be by motion to make them more specific. *Wilson v. Batchelor*, 182 N. C. 92, 108 S. E. 355.

**Defective Cause and Statement Distinguished.**—There is a difference observed between the statement in a complaint of a defective cause of action, and a defective statement of a good cause of action, for in the latter, if there is no request to have the pleadings made more certain or definite and no demurrer, the defective statement may be waived or cured by the answer. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207.

**Limitation on Power of Superior Court.**—On appeal from a court of a justice of the peace, the only limitation upon the power of the Superior Court to allow an amendment of the pleadings relates to the jurisdiction of the justice's court over the subject-matter of the action. *Wilson v. Batchelor*, 182 N. C. 92, 108 S. E. 355.

**Complaint Amended to Allege Warranty.**—Where the original complaint has alleged facts sufficient to constitute a warranty by defendant of an automobile which the latter had sold and delivered to him, the specific allegation of warranty becomes immaterial, and it is within the sound discretion of the trial judge to allow the complaint to be amended so as to allege a warranty. *Wiggins v. Landis*, 188 N. C. 316, 124 S. E. 621.

### § 542. Pleadings in libel and slander.

See note to section immediately following.

**Failure to Plead Truth.**—Where the truth of words alleged to be slanderous is not specifically pleaded, evidence thereof is properly rejected. *Elmore v. Atlantic Coast Line R. Co.*, 189 N. C. 658, 127 S. E. 710.

### § 543. Allegations not denied, deemed true.

In an action for libel, where the defendant has filed no answer, an instruction of the trial judge that the plaintiff must satisfy the jury as to the amount of the damages, and that the allegations under this section, of the libelous matter must be taken as true against the defendant is not error, and it was held in this case that while the charge is somewhat general on the issue of damages, it will not be held for reversible error on the record, and the absence of defendant's prayer to make it more specific. *Paul v. National Auction Co.*, 181 N. C. 1, 105 S. E. 881.

**Where an employee's action against a carrier** to recover damages for its negligence in inflicting on him a personal injury, upon allegations of the complaint that it arose in intrastate commerce, these allegations will be taken as true when not denied in the answer. *Barbee v. Davis*, 187 N. C. 78, 121 S. E. 176.

## ART. 18. AMENDMENTS

### § 545. Amendment as of course.

See note to § 535.

### § 547. Amendment in discretion of court.

See notes to § 549. See also notes of *Wiggins v. Landis Motor Co.*, under § 537; *Battle v. Mercer* under § 495.

**Discretion Not Reviewable on Appeal.**—It is within the sound discretion of the trial judge to allow amendments to pleadings, which will not be reviewed in the Supreme Court, when there is no suggestion that he had abused the discretionary powers he has exercised. *Fay, etc., Co. v. Crowell*, 184 N. C. 415, 114 S. E. 529.

**Illustrations—Amendment to Conform to Statute.**—A warrant of at-



tachment served by the sheriff of the county and addressed to "any constable or other lawful officer of the county," may be allowed by the court to be amended to conform to the statutory requirement. *Temple v. LaBerge*, 184 N. C. 252, 114 S. E. 166.

**Same—Increasing Amount Demands.**—In an action by the mortgagee to recover the value of a crop, subject to the lien of his chattel mortgage against the defendant, who is alleged to have received it to his own use, it is discretionary with the trial judge to allow the plaintiff to amend his complaint, either before or after verdict, so as to increase the amount of his demand in conformity with the facts he has proved upon the trial. *Warrington v. Hardison*, 185 N. C. 76, 116 S. E. 166.

**Same—To Show Real Parties.**—Upon the facts in this case, it is held, on appeal, that the trial court properly allowed the plaintiffs to amend their complaint to allege that some of the plaintiffs had acquired the interests of the others in a policy of insurance against loss by fire, in furtherance of justice, under the provisions of this section. *Redmon v. Netherlands Fire Ins. Co.*, 184 N. C. 481, 114 S. E. 758.

**Same—To Allege Warranty.**—Where the plaintiff seeks to recover damages upon the allegation that defendant falsely and knowingly induced him to purchase an automobile upon false representations, it is within the sound discretion of the trial judge to permit an amendment alleging a warranty, in addition to the allegations in the original complaint; and where the statute of limitations has not run as to the latter, the amendment cannot be construed to have a different result. *Wiggins v. Landis*, 188 N. C. 316, 124 S. E. 661.

## § 549. Unsubstantial defects disregarded.

**Good Cause of Action Defectively Stated.**—Pleadings should be liberally construed to determine their effect, and with a view to substantial justice between the parties, and when it appears on appeal from a motion to dismiss, on the ground of the insufficiency of the complaint to allege a cause of action, that merely a good cause has been defectively stated, the action will not be dismissed in the Supreme Court on motion made there, but if necessary, an amendment will be allowed to conform the pleadings to the facts proved, and the Court will disregard errors or defects in the pleadings or proceedings in the Superior Court, which are immaterial and where no substantial rights of the appellant will be injuriously affected thereby. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207.

**Clerical Errors.**—A warrant in attachment, in substantial conformity with our statute, C. S., sec. 805, and, in fact, executed by the deputy sheriff of the proper county, is valid, and will not be held otherwise when verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments being plenary under the provisions of this section. *May Co. v. Menzies Shoe Co.*, 186 N. C. 144, 119 S. E. 227.

## Subchapter VII. Trial and Its Incidents

### ART. 19. TRIAL

## § 557. Issues of fact.

**Editor's Note.**—Acts 1925, c. 5 did not affect the wording of the section but corrected an error in the amending Act of 1923, consequently the section is not repeated here.

**Power of Judge to Compel Party to Proceed.**—The judge is without authority to compel a party to an action to proceed with the trial of a cause transferred to the civil-issue docket when the issue has been joined within ten days from the commencement of the term. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612.

**§ 564. Judge to explain law, but give no opinion on facts.**

**Section Strictly Construed.**—This section, forbidding the expression of an opinion by the trial judge upon the evidence, is in derogation of the common-law rule, and its meaning will not be extended beyond its terms. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

Numerous decisions upon this section have shown a fixed purpose to enforce it rigidly as it is written. *Morris v. Kramer*, 182 N. C. 87, 89, 108 S. E. 381.

In *Morris v. Kramer*, 182 N. C. 87, 88, 108 S. E. 381, it was said: "There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct. The judges should be punctilious to avoid it, and to obey the statutory injunction strictly."

**Section Not Confined to Charge.**—In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial, which is calculated to prejudice either of the parties. And when once expressed such opinion or intimation cannot be recalled. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107, 108.

In *State v. Hart*, 186 N. C. 582, 587, 120 S. E. 345, the court said: "This statute has been interpreted by us to mean that no judge, in charging the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved, it being the true office and province of the jury to weigh the testimony and to decide upon its adequacy to establish any issuable fact. It is the duty of the judge, under the provisions of the statute, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts."

It was considered so essential to protect the right of trial by jury that this section was broadly worded and was among the earliest of our remedial enactments, and, while it refers in terms to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. *Morris v. Kramer*, 182 N. C. 87, 90, 108 S. E. 381.

In *State v. Jones*, 181 N. C. 546, 106 S. E. 817, the court said: "This Court has always been very careful to enforce the provision of the statute which prohibits a judge from expression of opinion in the trial of causes before the jury, this section, extending the inhibition to such expression in the hearing of the jury at any time during the trial, and whether the objectionable comments may be towards the testimony offered, the witness testifying, or the litigant and the cause he is endeavoring to maintain."

**Direct Language Not Necessary to Constitute Error.**—It is not required by this section, that the judge intimate in the direct language of his charge his opinion of whether, upon the evidence, a fact is fully or sufficiently proved, and if such intimation is reasonably inferred from his manner or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of the statute, and a new trial will be ordered on appeal. *State v. Hart*, 186 N. C. 582, 120 S. E. 345.

**Motive of Judge Immaterial.**—The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107, 108.

**Theory as to Evidence.**—"Much confusion as to proceeding with evidence, when a prima facie showing has been made, is eliminated by a



proper application of this section. Under our system the trial court, during the production of the evidence, must necessarily proceed upon the theory that the jury has a right to find as true all the evidence submitted by either party." *Hunt v. Eure*, 189 N. C. 482, 127 S. E. 593, 595.

**Charge of Court Construed as Whole.**—The charge of the court should be construed as a whole, so that all that relates to any phase thereof may be contextually considered, so as to place it in its proper setting; and while an exception to a part thereof, standing alone, may be subject to just exception, it is not ground for error if the charge, properly construed with other relative parts, states the law applicable to the evidence. *In re Will of Hardee*, 187 N. C. 381, 121 S. E. 667.

**What Remarks Presumed Correct.**—The remarks of the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are *prima facie* presumed on appeal to be correct. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

**A mere inadvertent "slip of the tongue"** in stating the evidence, will not be held as prejudicial error when counsel for defendant might easily have called attention thereto and had it corrected then and there. *State v. Sinodis*, 189 N. C. 565, 127 S. E. 601.

**Remarks made in mere pleasantry** by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. *State v. Jones*, 181 N. C. 546, 106 S. E. 817.

**Instructions on Interest of Counsel.**—An instruction that "it is the business of counsel to make their side appear the best side, their reasons the best of reasons; but you and I are under different obligations" is erroneous. *State v. Hardy* (N. C.), 128 S. E. 152.

**Comment on Absence of Defendants.**—Where the trial judge has questioned a witness as to the absence of the defendants from court, where their deed was being attacked for fraud, his remark that their absence was a circumstance that a fraud had been committed is an expression of opinion, forbidden by, this section, and constitutes reversible error. *Greene v. Newsome*, 184 N. C. 77, 113 S. E. 569.

**Comments upon Witnesses.**—"The expression, 'This witness has the weakest voice or the shortest memory of any witness I ever saw'—is clearly susceptible of the construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit." *State v. Bryant*, 189 N. C. 112, 126 S. E. 107, 109.

The testimony of defendant if accepted as true by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258.

In an action to recover damages for personal injury, where a release from liability is set up and relied upon, with evidence to support it, it is reversible and ineradicable error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant's witness, a nonresident attorney who had procured the release, and question him upon the professional ethics involved and the standard in his own State, of such conduct; which reflected on the witness, and no effort being made on his part to remove, by his instruction or admonitions to the jury, the prejudice thus necessarily occasioned can have that effect, and a new trial before another jury will be ordered on appeal. *Morris v. Kramer*, 182 N. C. 87, 108 S. E. 381.

Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to

whether a witness's character is considered good until proven bad in court, the judge's reply that is presumed to be good until the contrary is shown, is free from error under the circumstances. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

**Presuming Guilt of Accused.**—Where the defendant, on trial for violating our prohibition laws, has not admitted his guilt, and the trial judge, in his charge to the jury, has assumed that he was guilty upon the evidence of a State's witness, it is an expression by the judge of his opinion whether a fact has been fully or sufficiently proven, and constitutes reversible error. *State v. Sparks*, 184 N. C. 745, 114 S. E. 755.

**Opinion on One Count Applies to Others.**—Where the verdict of the jury has acquitted the defendant indicted for violating our prohibition laws under the count charging an unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes reversible error. *State v. Sparks*, 184 N. C. 745, 114 S. E. 755.

**Comment on Jury's Duty.**—Where the jury has failed to that time to agree upon a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but it was their duty to agree if they could do so without violence to their consciences; that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc. It was held, not to be an expression of opinion by the judge upon the evidence, contrary to the statute. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

**Instruction Based on Law.**—Where there is evidence of fraud and undue influence in the making of a will being caveated, and it appears that it was by a woman who derived the property from her first husband, of which marriage there was one child, and she had given this property to the children of her second marriage to a man who had no property, an instruction to the jury that, in the absence of some reasonable ground for such preference, this would constitute what the law calls an unreasonable will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge, contrary to the statute. *In re Will of Hardee*, 187 N. C. 381, 121 S. E. 667.

**Statement after Verdict Excusing Jurors for Term.**—When the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, was a matter within his discretion and cannot be construed to the prejudice of a defendant in a latter trial, though one of the same jurors sat upon his case, or as an expression of opinion forbidden by this section. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849.

**Directing a Verdict.**—Where the evidence upon the trial is permissible of more than one construction or different inferences may be drawn therefrom, peremptory instructions directing a verdict thereon in favor of either party to the controversy is an expression of an opinion thereon by the trial judge, forbidden by our statute, and constitutes reversible error. *United States Railroad v. Hilton Lumber Co.*, 185 N. C. 227, 117 S. E. 50.

**Refusal to Correct Special Requests for Instructions.**—Where the general charge of the court to the jury covers every correct principle applying under the evidence in the case, and of the special prayers, it is not objectionable that the court refused to correct special requests for instructions in the language offered by the appellant. *Williams v. Hedgepeth*, 184 N. C. 114, 113 S. E. 602.

**Omission of Necessary Instruction.**—The defendant, charged with



the murder, introduced evidence of an alibi which was material to his defense. In his charge to the jury the judge did not refer to this evidence. It was held, error. *State v. Melton*, 187 N. C. 481, 122 S. E. 17.

When a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is incumbent on the trial judge, in his charge to the jury, to apply to the various aspects of the statute such principles of the law of negligence as may arise under the evidence in the case. *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170. See notes of this case under § 2116.

Where the effect of a charge of the court to the jury is to eliminate from the case an instruction upon a principle of law arising from the evidence, so necessary that its omission would necessarily and substantially prejudice one of the parties, in the consideration of the evidence by the jury, it will be held for reversible error, notwithstanding the party so prejudiced has not tendered a prayer for instruction covering the omission of which he complains. *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170.

In the absence of a special request for instruction it is not reversible error under this section for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case. *State v. O'Neal*, 187 N. C. 22, 120 S. E. 817.

**Objection as to Fullness of Statement.**—An instruction which gives to the jury a clear and comprehensive charge on the law applicable to the evidence in the case, stating the position of the respective parties as to every feature thereof, is not erroneous as failing to explain and declare the law arising from the evidence, as required by this section and an objection that a fuller statement of the evidence was required cannot be considered on appeal when exception thereto has not been brought to the attention of the trial court at the time of the alleged omission. *Tatham v. Andrew Mfg. Co.*, 180 N. C. 627, 105 S. E. 423.

It is not required of the judge to charge the jury of the full definitions of fraud upon which equity will set aside a deed, the subject of the action, if he instructs them correctly and clearly upon such of the principles as are applicable to the issue under the relevant evidence in the case, and the general charge, as so given, is within the intent and meaning of this section. *Williams v. Hedgepeth*, 184 N. C. 114, 113 S. E. 602.

**Charge Limiting Injury.**—A charge that limited the injury to the mere making of an agreement between an agent and the defendant as to the payment of freight charges over a logging road, and omitted to instruct upon evidence relating to the purchaser's notice of the agent's limitation of authority, before shipment, and of the defendant's waiver of the parol agreement and his ordering the shipment out of the goods under the original written agreement, is reversible error. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 102 S. E. 611.

Where a charge excluded from consideration important evidence in the case bearing upon the essential inquiry whether defendant had waived, or surrendered, all rights under an agreement, if he had any, and agreed to go back to an original contract, it was erroneous. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 102 S. E. 611.

**Charge Covering Subordinate Features.**—When a judge has followed this section and charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but, as stated, on the substantive features of the case arising on the evidence, the judge is required to give a correct charge

concerning it. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 388, 102 S. E. 611.

**Waiver of Error.**—A failure to comply with this section is error which is not waived by failure to request special instructions, where there is no charge applicable to the facts given in evidence. *Nichols v. Champion Fibre Co. (N. C.)*, 128 S. E. 471.

**Exceptions after Verdict.**—The fact that exception was not entered at the time a remark was uttered is immaterial. The statute is mandatory, and all expressions of opinion by the judge during the trial, in like manner, with the admission of evidence made incompetent by statute, may be excepted to after the verdict. *State v. Bryan*, 189 N. C. 112, 126 S. E. 107, 109.

**Same—Failure to Call Judge's Attention to Error.**—The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, when he has not done so an exception after verdict comes too late to be considered on appeal. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258.

**Request for Special Instructions.**—Where the trial judge has instructed the jury correctly but generally on the essential features of the cases, the charge will not be held for error upon appellant's exception that he had not explained to the jury the legal principles in conformity with the provisions of this section when he has not submitted in apt time correct special prayers for instruction to such effect. *Bank, etc., Co. v. Yelverton*, 185 N. C. 314, 117 S. E. 299.

**Charge of Rape.**—As to whether, under the circumstances of this case, the trial judge committed error in not sufficiently stating the evidence in the case to the jury as required by this section, *Quaere?* *Brown, J.*, writing the principal opinion; *Walker and Hoke, J. J.*, holding the view that a new trial should be granted upon the insufficiency of the evidence to convict of the charge of rape; and *Allen, J.*, and *Clark, C. J.*, dissenting upon the ground that the judge was not in error as to his statement of the evidence to the jury. *State v. Cline*, 179 N. C. 703, 103 S. E. 211.

## § 565. Requests for instructions.

**Failure to Sign—Discretion of Court.**—It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it as required by the statute. *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215.

## § 567. Demurrer to evidence.

See note to § 4643.

**Plaintiff Entitled to Benefit of Inferences.**—On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment and reasonable inference to be drawn therefrom. *Standard Oil Co. v. Hunt*, 187 N. C. 157, 121 S. E. 184. *Southwill v. Atlantic Coast Line R. Co.*, 189 N. C. 417, 127 S. E. 361; *Hicks v. Southern R. Co.*, 189 N. C. 548, 127 S. E. 552; *Allen v. Garibaldi*, 187 N. C. 798, 123 S. E. 66; *Lindsey v. Suncrest Lumber Co.*, 189 N. C. 118, 126 S. E. 174. *Ghorley v. Atlantic, etc., Ry. Co.*, 189 N. C. 634, 127 S. E. 634.

**When Motion Should Be Disallowed.**—Under the provision of this section, the defendant, after the court has refused his motion as of nonsuit upon the evidence, may except, introduce evidence, and renew his motion after all the evidence has been introduced; but his last motion only can be considered, and upon all the evidence in the case, and if therein the plaintiff has made out a case, the motion should be disallowed. *Blackman v. Woodmen*, 184 N. C. 75, 113 S. E. 565.

**How Questions of Law Presented.**—Whether there is evidence from



which the jury could answer an issue as to the signature of an agent in the affirmative is a question of law, and is presented to the court for decision by motion for judgment of nonsuit. *McCall v. Textile Industrial (N. C.)*, 128 S. E. 349.

**Ejectment—Judgment as to Title.**—While in ejectment the plaintiff must recover upon the strength of his own title, though the title is conclusively presumed to be out of the State, and for the lack of evidence of his legal title a motion to nonsuit thereon is proper under this section, it is error for the judgment to incorporate an adjudication in defendant's favor as to his title, as such is only permissible on affirmative findings sufficient to justify it. *Moore v. Miller*, 179 N. C. 396, 102 S. E. 426, 432.

**Proof of Title by Plaintiff.**—In an action involving title to lands the plaintiff must recover on the strength of his own title, and he must show title of the State by a grant from the State directly to himself, or connect himself with one by proper deeds or he must show possession and the assertion of ownership, with or without color, for the requisite period, or that the defendant is estopped to deny his title, and where he has not shown any grant from the State or possession in himself or those under whom he claims, or any facts creating an estoppel in his favor, but only a line of deeds beginning in 1895 covering a larger tract of land and his possession, with assertion of ownership, of a smaller tract included therein, he has failed in his proof, and a judgment as on nonsuit upon the evidence is properly entered against him. *Moore v. Miller*, 179 N. C. 396, 102 S. E. 627.

**Evidence Sufficient to Deny Nonsuit.**—Where the failure of defendant employer to furnish the plaintiff, its employee, a safe place to work, concurs with the negligence of a fellow servant in proximately causing the injury in suit, the defendant is liable in damages for the consequent injury, and his motion as of nonsuit upon the evidence, under this section is properly denied. *Beck v. Thomasville Chair Co.*, 188 N. C. 743, 125 S. E. 615.

Where there is evidence tending to show that defendant's night watchman was employed to perform his duties only within a certain enclosure at the defendant's mill; that he had also been deputized by the town authorities to act for defendant as special policeman; that he had arrested the plaintiff at a remote place on the mill settlement property, where he was not authorized by the defendant to guard, and caused his incarceration in the city jail; that the case was dismissed by the justice of the peace for the lack of evidence and the plaintiff finally discharged: It was held, a question for the jury in plaintiff's action for damages for false arrest and imprisonment, of whether the defendant's night watchman was acting within the scope of his employment at the time; and a motion as of nonsuit upon the evidence was properly denied. *Butler v. Holt-Williamson Mfg. Co.*, 182 N. C. 547, 109 S. E. 559.

**Motion for Judgment on Exceptions.**—In a proceeding attaching the validity of an improvement assessment, the burden is on the defendant municipality to sustain the assessment, and a motion by the plaintiff for judgment on her exceptions after defendant's evidence is in, is in effect a motion for judgment as of nonsuit under this section. *Holton v. Mosksville*, 189 N. C. 144, 126 S. E. 326.

**Exception Considered on Appeal.**—Where exception is taken to the refusal of the court to dismiss the action, as in case of nonsuit, both after the close of plaintiff's evidence and after the defendant's evidence has been introduced, only the exception taken after the close of all the evidence will be considered on appeal, under the express provision of this section, and, so considered, the evidence must be accepted as true and construed in the light most favorable to the plaintiff. *Butler v. Holt-Williamson Mfg. Co.*, 182 N. C. 547, 109 S. E. 559.

**Waiver.**—The introduction of evidence by the defendant upon the overruling of his motion at the conclusion of the plaintiff's evidence,

and his failure to renew his motion on all the evidence, is a waiver of his right under the statute. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628.

A motion for nonsuit at the close of plaintiff's evidence is waived by the defendant's introducing evidence. *Gilland v. Carolina Crushed Stone Co.* (N. C.), 128 S. E. 158.

An election by defendant to offer evidence after refusal to grant nonsuit is a waiver of the exception to such refusal. *Nash v. Royster*, 189 N. C. 408, 127 S. E. 356.

In order for the defendants to avail themselves of the provisions of this section, in demurring to the plaintiffs' evidence on the trial, it is necessary for the defendants also to demur after the plaintiffs have closed their case, or it will be construed as a waiver of their right to demur. *Nowell v. Basnight*, 185 N. C. 142, 116 S. E. 87.

### § 568. Waiver of jury trial.

See note of *Green Sea Lumber Co. v. Pemberton* under Const. Art. 4, § 13.

## ART. 20. REFERENCE

### § 572. By consent.

See note of *Green Sea Lumber Co. v. Pemberton* under Const. Art. 4, § 13.

### § 573. Compulsory.

**Exception to Order of Court.**—By excepting to an order of court referring to the taking and stating a long account between the parties involved in the controversy as determinative, a party may preserve his right to a trial by jury upon the evidence thus taken, unless he waives his right during the progress of the reference; and while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist thereon when the issue is to be determined solely by the reference provided for by this section. *Green Sea Lumber Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119.

**Appeal Before Judgment Premature.**—In *Leroy v. Saliba*, 182 N. C. 575, 108 S. E. 303, it was said:—"The jury having found that the partnership existed, an appeal from the order of reference before judgment upon the report thereon is premature and fragmentary, and must be dismissed by the court *ex mero motu*. The defendant should have noted his exception and upon the coming in of the report and exceptions thereto should have brought up his appeal from the final judgment. No appeal lay at this stage."

## ART. 21. ISSUES

### § 582. Of fact.

**Refusal to Submit Defendant's Issue.**—Where an issue raised by the new matter in the answer, controverted by the reply is material to the defense relied upon by defendants to plaintiff's cause of action there is error in refusing to submit the issue tendered by defendants, or at least an issue involving the matters relied upon by the defendants, and alleged in their answer. *Brown v. Ruffin*, 189 N. C. 262, 126 S. E. 613, 615.

### § 584. Form and preparation.

**When Sufficient.** — It seems that the law is settled that if the issues submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to the same. *Bailey v. Hassell*, 184 N. C. 450, 459, 115 S. E. 166.



## ART. 22. VERDICT

## § 590. Exceptions.

**Errors in Charges.**—An exception taken for the first time in the appellant's assignment of error will not be considered on appeal, except under this section as to the charge of the court, etc., it being required that it appear in the record that it had been duly and properly taken. *Brown v. Brown*, 182 N. C. 42, 108 S. E. 380.

Errors in the charge of the court, or in granting or refusing to grant prayers for instruction, shall be deemed excepted to without the filing of any formal objections, if specifically raised and properly presented in the case on appeal, prepared and tendered in apt time; and when exceptions are taken they should be considered and passed upon by the trial court, and upon being overruled, made to appear in the record on the appeal to the Supreme Court. Consolidated Statutes, secs. 643, 641, 640, and this section. *Paul v. Burton*, 180 N. C. 45, 104 S. E. 37.

**Exceptions to the judge's charge** taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of C. S. section 643, and this section. And an exception to a previous intimation of the judge made upon the trial to the effect objected to, is not required. *Cherry v. Atlantic Coast Line R. Co.*, 186 N. C. 263, 119 S. E. 361.

## § 591. Motion to set aside.

**What Motions Included.**—This section refers to motions made in the ordinary course and practice of the courts, and does not impair or interfere with equitable principles controlling the conduct of the litigant in the subsequent course of a proceeding. *Bizzell v. Auto Tire Equipment Co.*, 182 N. C. 98, 108 S. E. 439.

**Discretion of Court.**—The discretion given by this section to the trial judge to set aside a verdict, is not an arbitrary one to be capriciously exercised, but reasonably with the view to an equitable result in the correct administration of justice, and will not be reviewed on appeal except in cases of abuse thereof. *Bailey v. Dibbrell Mineral Co.*, 183 N. C. 525, 112 S. E. 29.

Where the judge orders a verdict set aside, deeming it to be in the cause of justice, and as contrary to the weight of the evidence and in disregard of his instructions of the law thereon, he is acting within the discretion given him by this section. *Bailey v. Dibbrell Mineral Co.*, 183 N. C. 525, 112 S. E. 29.

**Court Not Empowered to Change Verdict.**—The trial judge has the authority to set aside the verdict of the jury as to matters in his sound discretion or as a matter of law, leaving the cause at issue, but he may not change the verdict and thereupon dismiss the action as a matter of law, the exercise of such power being allowed only for want of jurisdiction or upon the ground that no cause of action has been sufficiently alleged in the complaint. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32.

**Where Jury Commits Palpable Error.**—When it appears from the evidence, the charge of the court, and the verdict that the jury has committed a palpable error in the answer to one of the issues, it is the duty of the trial judge to set it aside to prevent a miscarriage of justice. *Hussey v. Atlantic Coast Line R. Co.*, 183 N. C. 7, 110 S. E. 599.

**Where Issues Are Separate.**—In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, as allowed by C. S., 3524, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial. *Hussey v. Atlantic Coast Line R. Co.*, 183 N. C. 7, 110 S. E. 599.

In the plaintiff's action to recover damages against a railroad com-

pany to shipment of goods and a penalty for the failure of the defendant to pay the claim for 90 days, C. S., 3524, and the evidence tends only to sustain for plaintiff's demand, on both issues, the judge may retain the verdict on the issue of damages answered in plaintiff's favor, set aside the verdict on the second issue denying recovery of the penalty, and on the retrial of the second issue direct a verdict thereupon, on the same evidence, in plaintiff's favor. Semble, the court could have so answered this issue as a matter of law on the first trial. *Hussey v. Atlantic Coast Line R. Co.*, 183 N. C. 7, 110 S. E. 599.

**Agreement Made by Attorney for Client.**—Where the trial judge has announced his decision to set aside a verdict unless the parties should agree in a certain particular, to which the plaintiff's attorney agreed without the consent of his client and against her instructions, and the judgment so agreed upon has been accordingly entered, the plaintiff may not thereafter repudiate the agreement made in her behalf by her attorney, and also repudiate the result thereby attained, and she is estopped from resisting the entry of judgment setting aside the verdict *nunc pro tunc*. *Bizzell v. Auto Tire Equipment Co.*, 182 N. C. 98, 108 S. E. 439.

**Where Matter Determined Out of Term.**—Where the losing party moves to set aside a verdict after the trial, as within the statutory discretion of the trial judge, and the judge intimates he will grant the motion, but the parties agree that he may determine the matter out of the term, in view of attempting to compromise the disputed matter; and not hearing from the parties the judge renews his previous intimation, and sets a time and place for hearing, at which one of the parties appears and refuses the suggestion of the judge as a basis of a just settlement, his then setting the verdict aside within his reasonable discretion deals with the record as it originally stood, and is not abuse of the discretion given him by this section. *Bailey v. Dibbrell Mineral Co.*, 183 N. C. 525, 112 S. E. 29.

**Motion Not Reviewable on Appeal.**—The motion to set aside the verdict as being contrary to the weight of the evidence was addressed to the sound discretion of the judge and not reviewable in the Supreme Court. *Forester v. Betts*, 179 N. C. 608, 609, 103 S. E. 210.

## ART. 23. JUDGMENT

### § 593. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.

**In General.**—This section dealing with the procedure before the clerk as to the service of process, the filing of pleading and rendering the judgments by default, upon uncontested actions to recover upon bills, notes, bonds, and other forms of indebtedness, deals particularly with that class of action, and is construed to be an additional remedy given, and not repealed by the provisions made applicable to the general procedure and remedies passed later at the same session of the Legislature, or by the amendment expressly referring to it, passed as ch. 96, Special Session of 1920; and ch. 156, Laws 1919, amending this section is in force as a permissive and selective method of procedure in the class of actions to which it refers. *Young v. Davis*, 182 N. C. 200, 108 S. E. 630.

**Constitutionality.**—This section authorizing a judgment by default final for the want of an answer before the clerk of the court is not an unconstitutional interference with the jurisdiction of the judge of the court, the clerk being a component part of the Superior Court, and the exercise of the power of the judge being recognized and preserved by the right of appeal. *Thompson v. Dillingham*, 183 N. C. 566, 112 S. E. 321.

**Concurrent Jurisdiction of Clerk and Court.**—“The statute is an



enabling act and does not deprive the superior court, in term, of its jurisdiction to render judgments, which by its provisions may also be entered by the clerk, either at any time or on any Monday of the month. The purpose and effect of the statute is to confer upon the clerk the same authority as that theretofore exercised by the judge in term with respect to judgments covered by the statute. The jurisdiction of a judge, in term, to render judgments upon voluntary nonsuits, by consent of parties to the action, upon notes, bills, bonds, stated accounts, balances struck, or other evidences of debt, within the jurisdiction of the superior court, or by default final or default and inquiry, and to make orders and decrees in actions to foreclose mortgages, etc., is not affected by the provisions of this statute. The authority of the clerk is concurrent with and additional to that of the judge, in term." *Caldwell v. Caldwell* (N. C.), 128 S. E. 329, 331.

"The fact that both complaint and answer had been filed, and issues joined, and the papers transmitted by the clerk to the court for the trial of action upon the issues, did not deprive the clerk of this authority. A judgment upon voluntary nonsuit may be entered by the clerk, at any time, in any action in which the judge, in term, may render such judgment." *Caldwell v. Caldwell* (N. C.), 128 S. E. 329, 331.

**Same—Effect of Judgments Entered by Clerk.**—"Judgments entered by the clerk, as authorized by this statute, under the express provisions thereof or by necessary implication, are judgments of the superior court, and are of the same force and effect, in all respects, as if rendered in term and before a judge of the superior court." *Caldwell v. Caldwell* (N. C.), 128 S. E. 329, 331.

**Appeals from Clerk to Judge.**—"There is no provision in the statute regulating an appeal from a judgment entered by the clerk under the authority of the statute upon the ground that such judgment is erroneous. It would seem that the appeal from such judgment, upon this ground, may be taken from the clerk to the judge, as provided by the statute, for appeals from orders and judgments upon other grounds. The proper practice, we think, is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judge of the superior court to the Supreme Court." *Caldwell v. Caldwell* (N. C.), 128 S. E. 329, 332.

**Same—Jurisdiction of Judge.**—"The judge's jurisdiction, however, of a motion to set aside a judgment entered by the clerk, under the authority of this statute, is original as well as appellate." *Caldwell v. Caldwell* (N. C.), 128 S. E. 329, 333.

**Same—Applicability of Sections 633, 635, and 636.**—"C. S. §§ 633, 635, and 636, regulating appeals from the clerk to judge, are applicable appeals from errors, and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to chapter 92, Public Laws 1921, Extra Session. These sections of consolidated statutes do not apply to orders and judgments made or entered by the clerk as authorized by this latter statute." *Caldwell v. Caldwell* (N. C.), 128 S. E. 329, 333.

### § 593 (a). Return of execution; order for disbursement of proceeds.

In all executions issued by the clerk of the Superior Court upon judgment before the clerk of the Superior Court, under section five hundred and ninety-three, volume three of the Consolidated Statutes, and execution issued thereon, the sheriff shall make his return to the clerk of the Court, who shall make final order directing the sheriff to disburse the proceeds received by him under said execu-

tion: *Provided*, that any interested party may appeal to the Superior Court, where the matter shall be heard *de novo*. (1925, c. 222, s. 1.)

### § 595. By default final.

See note of *Battle v. Mercer* under § 495.

**In General.**—A judgment by default final for the want of an answer is permissible under the provisions of this section, when the complaint alleges one or more causes of action, each consisting of the breach of an express or implied contract to pay absolutely or upon contingency, a sum or sums of money fixed by the terms of the contract, or computable therefrom. *Beard v. Sovereign Lodge*, 184 N. C. 154, 113 S. E. 661.

**Court Must Construe Complaint.** — Upon motion made before the clerk to set aside a judgment by default final for the want of an answer, under this section, and also heard on appeal in the Superior Court, the failure of the defendant to have filed his answer only admits the truth of the facts alleged in the complaint, leaving the court to construe the complaint to ascertain if the facts alleged are sufficient to sustain the judgment, and if not, the judgment will be set aside. *Beard v. Sovereign Lodge*, 184 N. C. 154, 113 S. E. 661.

**The verification to a complaint** upon which judgment by default final for the want of an answer has been rendered, is not objectionable on the ground that it apparently shows that the plaintiff appeared before himself for the purpose, when by a proper perusal of the affidavit it will show that it followed the form approved and required by the statute and precedents, and was duly made before the clerk of the Superior Court in which the cause was pending. *Bostwick & Bros. v. Laurinburg, etc., R. Co.*, 179 N. C. 485, 102 S. E. 882.

Sufficient verifications, as this section requires, not appearing in the complaint in an action upon a money demand in an amount certain, etc., will be treated as a nullity and irregularity, and judgment by default final, etc., thereon will be set aside on motion of defendant made before the clerk in apt time, on a proper show of merits. *McNair v. Yarboro*, 186 N. C. 111, 118 S. E. 913.

**Where Inquiry Necessary.** — Where a judgment by default may be entered in the due course and practice of the courts, an inquiry is only necessary where the amount of the claim is uncertain, but where the claim is precise and final by the agreement of the parties or can be rendered certain by mere computation, there is no need of proof, for the judgment by default admits the claim, and a judgment by default final should be entered. *Bostwick & Bros. v. Laurinburg, etc., R. Co.*, 179 N. C. 485, 102, S. E. 882.

**Same—Action upon Disputed Open Account.** — C. S., 595, 596, 597, govern the taking of judgments by default for want of answer or demurrer, under the provisions of § 509 as amended in 1921 and it is erroneous for the clerk to enter a judgment by default final when it appears from the complaint that the action is to recover upon an unpaid disputed balance of an open account for goods sold and delivered, it being only proper for a judgment by default and inquiry, the amount to be determined by the jury upon the evidence. *Brooks v. White*, 187 N. C. 656, 122 S. E. 561.

**When Judgment Upheld.** — Where a complaint states two or more causes of action arising from the same default and any one is sufficient to uphold a judgment by default final for the want of an answer, which has been entered in the due course and practice of the courts, such judgment will be upheld. *Bostwick & Bros. v. Laurinburg, etc., R. Co.*, 179 N. C. 485, 102 S. E. 882.

**Allegations Sufficient to Sustain Judgment.**—A complaint alleging a money demand for a sum certain with an express promise to pay is suf-



ficient to sustain a judgment by default final for the want of an answer. *Thompson v. Dillingham*, 183 N. C. 566, 112 S. E. 321.

Allegations in the complaint in action to recover damages to a shipment of cantaloupes that it had been sold to a particular customer at a certain price, which sale had been lost by the breach of contract of defendant railroad to furnish a car; that upon presentation of claim the defendant had instructed plaintiff to sell the melons to the best advantage and deduct the price from the total demand, which the plaintiff had done leaving a balance in a certain sum set out in the complaint for which judgment is claimed, and showing the amount of loss deducted, is sufficient to sustain a judgment by default final, in that sum, for the want of an answer in accordance with the course and practice of the Courts. *Bostwick & Bros. v. Laurinburg, etc.*, R. Co., 179 N. C. 485, 102 S. E. 882.

Allegations of a complaint against a railroad to recover a specified amount of damage to shipment of carload of cantaloupes for defendant's failure of its obligation to furnish cars at a specified time and place for the loading, are insufficient for judgment by default final, and such judgment may not be rendered in the course and practice of the Courts. *Bostwick & Bros. v. Laurinburg, etc.* R. Co., 179 N. C. 485, 102 S. E. 882.

**Judgment Voidable—Objection by Surety.**—A judgment by default final entered by the clerk of the court is not void because of interest, but voidable only, not being in violation of a statute bearing directly on the question, and objection on that ground may be waived by the parties; and while the judgment stands unassailed and unexcepted to by the principal defendants, or by any other directly representing them, it is not open for a surety on an attachment bond given in the case to maintain an objection for his own benefit, and he must conform to his obligation according to its tenor. *Connelly v. White*, 105 N. C. 65, cited and distinguished. *Thompson v. Dillingham*, 183 N. C. 566, 112 S. E. 321.

**Effect of Ch. 92, Extra Session 1921.**—The requirement of this section, that to obtain judgment by default, etc., in an action upon a money demand, the complaint must be properly verified (C. S., sec. 529), is not affected by chapter 92, Extra Session of 1921, requiring a copy of the verified complaint to be served on the defendant with the summons; expressly affirming the provisions of this section. *McNair v. Yarboro*, 186 N. C. 111, 118 S. E. 913.

## § 597. By default for defendant.

See note of *Brooks v. White* under § 595.

## § 597 (a). Judgment by default where no answer filed; record; force; docket.

See note of *Battle v. Mercer* under § 495.

**Waiver of Right by Plaintiff.**—Where the plaintiff is entitled to a judgment by default before the clerk for failure of defendant to answer within the statutory time, he waives this right by waiting until after the clerk has permitted an answer to be filed and the matter has been transferred to the civil-issue docket for trial. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612.

**Failure of One of Several Joint Defendants to Answer.**—Where action is brought, to recover for goods sold and delivered, against several defendants jointly, and the complaint has been duly served on them all, the plaintiff is entitled to judgment by default before the clerk against one or more of the defendants who have failed to answer or demur within the twenty days after service of the complaint. *Brooks v. White*, 187 N. C. 656, 122 S. E. 561.

**§ 597 (c). Time for entering judgment where copy of complaint served on defendant.**

If the plaintiff or plaintiffs shall cause a copy of the complaint to be served upon any of the defendants, either at the time of issuing summons or thereafter, then judgment shall be entered by the clerk as to the defendants served on [any] Monday after the expiration of time to answer. (Ex. Sess. 1921, c. 92, s. 11; 1925, c. 16.)

**§ 600. Mistake, surprise, excusable neglect.**

**Meritorious Defense Must Be Shown.**—In order to set aside a judgment for mistake, surprise or excusable neglect, there must be a showing of a meritorious defense so that the court can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1.

**Judgments Irregularly Entered.**—This section relates to judgments taken in the course and practice of the courts, and has no application to judgments irregularly entered, as for example, a judgment by default taken after answer has actually been filed in time. *Gough v. Bell*, 180 N. C. 268, 104 S. E. 535.

Where a judgment by default has been irregularly entered, it may be set aside, on motion made within a reasonable time and on a proper showing of merits, in the sound legal discretion of the Court, and in proper instances more than twelve months after the rendition of the judgment, the period stated in this section being a statutory restriction applying only to judgments entered according to the course and practice of the Courts, wherein it is necessary that motions to set aside the judgment be made. *Bostwick & Bros. v. Laurinburg, etc., R. Co.*, 179 N. C. 485, 102 S. E. 882.

**Inexcusable Neglect.**—Judgment by default for the want of an answer will not be set aside for excusable neglect, when it was regularly entered at the preceding term of the court, and it appears that the moving party, after endeavoring to compromise, promised to send at once the amount sued for, failed to do so, and his attorney had been notified before the commencement of the term at which the judgment was entered that this course would be taken. *Union Guano Co. v. Middlesex Supply Co.*, 181 N. C. 210, 106 S. E. 832.

Where a defendant relied on a surety to file an answer, the latter not having been served or otherwise brought into the action, this is not excusable neglect for which a default judgment may be set aside. *Elramy v. Abeyounis*, 189 N. C. 278, 126 S. E. 743.

**In claim and delivery proceedings** on a mortgage, no pleadings were filed and the plaintiff had no knowledge of the trial until after the term. A personal judgment, not in the alternative, as usual, was entered against the plaintiff. Such a judgment is irregular. *Snow Hill Live Stock Co. v. Atkinson*, 189 N. C. 250, 126 S. E. 610.

**When Defendant Non Compos Mentis.**—A judgment obtained against one who was non compos mentis is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1.

**Same—Refusal of Judge to Pass Upon.**—Upon passing upon defendant's motion to set aside a judgment for excusable neglect, upon the ground of his intestate's insanity, it appeared that he was represented on the trial by his counsel, and his depositions read in evidence, and that his friends and relations appeared thereat, and his defense to the action was vigorously made: It was held, not reversible error for the judge to refuse to pass upon the defendant's insanity at the time of the trial. *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1.



**Failure of Defendant's Attorney to File Answer.**—Where it appears upon defendant's motion to set aside a judgment by default, pursuant to this section, that the same was regularly calendared for trial, the defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney had failed to do so, and that the judgment was accordingly rendered, he has not shown such excusable neglect as will entitle him to have the judgment set aside on his motion under the provisions of the statute. *Gaster v. Thomas*, 188 N. C. 346, 124 S. E. 609.

**"Negligence before judgment will defeat a party's right to have a judgment, regularly entered, set aside or vacated on the grounds of mistake, inadvertence, surprise, or excusable neglect under this section but such negligence need not bar the right of the complaining party to have an erroneous judgment corrected by appeal, or an irregular judgment vacated on motion where he moves with proper diligence, after notice of such judgment, and is able to show that his rights have been wrongfully prejudiced thereby."** *Snow Hill Live Stock Co. v. Atkinson*, 189 N. C. 250, 126 S. E. 610.

**Erroneous Wording of Summons No Defense.**—Where a party is made a defendant by service of summons, together with the complaint filed in the action, he is irrebuttably fixed with notice that, under the provisions of this section, he is required to file his answer in twenty days from substitute service; and on his motion to set aside judgment rendered in default of an answer, his ignorance of the law will not excuse him, though misled by the erroneous wording of the summons in this respect. *Lerch Bros. v. McKinne Bros.*, 187 N. C. 419, 122 S. E. 9.

**Appeal from Order of Clerk.**—"A motion to set aside and vacate a judgment entered by the clerk, as authorized by statute, may be made before and passed upon by either the judge or the clerk. From an order made by the judge, upon such motion, an appeal may be taken to this court, which has jurisdiction to pass upon and determine all matters of law or legal inference duly presented by appeal. Const. of N. C. art. 4, § 8. From an order made by the clerk, upon such motion, an appeal will lie to the judge, who shall hear and pass upon the motion, *de novo*." *Caldwell v. Caldwell* (N. C.), 128 S. E. 329, 332.

**Rulings of Law Alone Reviewable on Appeal.**—Upon appeal from the refusal of the Superior Court judge to set aside a judgment for excusable neglect, the facts as found by him upon which he has acted are ordinarily conclusive, and his rulings of law only are reviewable. *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1.

## § 602. For and against whom given; failure to prosecute.

**Recovery on Counterclaim.**—Where an action on contract has originally and properly been brought in the Superior Court because of an equity involved, or its being for the possession of personal property, the recovery on a counterclaim, in the Superior Court, will not be denied for want of jurisdiction on the ground that the demand thereof was for a less sum than two hundred dollars, the jurisdiction as to matters of counterclaim coming within the provisions of C. S., sections 519, 521, and this section. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

The entire spirit of our code procedure is to avoid multiplicity of actions and where an action for damages arising by tort from a collision between automobiles has been brought by one of the parties, he may successfully plead the pendency of this action to one brought against him by the opposing party in another county, and have it dismissed, the remedy of the defendant in the second action being by way of counterclaim, pursuant to this section; and that relief may be asked for by each in his own action does not affect the fact that the subject of

both actions is the same acts or transactions, to be determined by one judgment either for the plaintiff or defendant in the case. *Allen v. Salley*, 179 N. C. 147, 101 S. E. 545.

**In an action against a railroad company and the Director General of Railroads**, following the opinion of the Supreme Court of the United States, there is no liability upon the railroad company, but the action may be continued against the Director General under the provisions of this section, that a several judgment may be entered. *Kimbrough v. R. R.*, ante, 234, cited and applied. *Smith v. Seaboard Air Line Ry. Co.*, 182 N. C. 290, 109 S. E. 22.

Where the consignor brings action against the consignee for the purchase price of a shipment by common carrier, while the railroad was under control of the Federal Director, and the defense is that it had not been delivered, it was proper to make the Director General a party to the action; and in case the shipment had been lost through the carrier's default, a judgment against the carrier is the proper one. *Acme Mfg. Co. v. Tucker*, 183 N. C. 303, 111 S. E. 525.

### § 607. When passes legal title.

See note to § 430.

### § 608. Regarded as a deed and registered.

**Consent Decrees Conveys Title.**—A consent decree for the recovery of the lands in fee has the effect of conveying the legal estate in fee "as between the parties," and is good as against third persons in the absence of fraud or collusion. *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25.

**Same—Agreement in Divorce Proceedings.**—In an action brought by the wife for a divorce a mensa, an agreement that the wife have a life estate in certain of her husband's lands, is binding as a consent judgment, though a divorce has not been decreed therein; and it is not affected by the fact that an award of the children has therein been made with the sanction of the court. *C. S.*, 1668, and a writ of possession may be issued. *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25.

### § 613. Docketed and indexed; held as of first day of term.

**Judgment Signed out of Term.** — The provisions of this section that judgments relate to the first day of the term, apply when the judgment was rendered and docketed during the term, or within ten days after adjournment thereof, and not to a judgment signed out of term by the consent of the parties, except where third persons are prejudiced; and the position may not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was not made within the time prescribed by the order, under the theory that the date of the order was to relate back to the commencement of the term, when it appears that by consent the order was signed after the term of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it. *Contestee Chemical Co. v. Long*, 184 N. C. 398, 114 S. E. 465.

### § 614. Where and how docketed; lien.

**Priorities between Docketed Judgment and Unrecorded Deed.** — The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. *Eaton v. Doub* (N. C.), 128 S. E. 494.

Where there is a lien by judgment against the holder of an equitable title, under this section to lands who also holds a registered mortgage from his grantee under an unregistered deed to secure the balance of the purchase price, his deed registered after the lien of the judgment had



taken effect, cannot render the lien under the mortgage superior to the judgment lien, and equity will remove the lien of the mortgage cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331; *Mills v. Tabor*, 182 N. C. 722, 109 S. E. 850.

**Liability of Trustee.**—A trustee having a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of this section may not pay the same to the trustor without incurring liability; and in an action brought for that purpose the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. *Barrett v. Barnes*, 186 N. C. 154, 119 S. E. 194.

**Execution against Estates by Entireties.** — Estates by entireties exist in this State only as an incident to the marriage relationship of husband and wife, and execution may not issue to subject it to the payment of a judgment obtained against only the one or the other of them during their joint lives, but if one of them should die leaving surviving the other against whom judgments have been obtained and the liens thereof are presently existent, the right to issue execution against the estate formerly held by them in entireties attaches as to all at the time the survivor has acquired the full title and distribution of the proceeds must be made pro rata without reference to the time the judgments may have been obtained. *Johnson v. Leavitt*, 188 N. C. 682, 125 S. E. 490.

**Purchaser at Execution Sale.** — Where the judgment creditor and a mortgagee under a prior registered mortgage claim the land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale. *Mills v. Tabor*, 182 N. C. 722, 109 S. E. 850.

## § 621. For money due on judicial sale.

**Petition by Commissioner.** — A commissioner appointed for the sale of land in proceedings for partition, after confirmation of sale to a private purchaser, filed a petition in the cause after notice alleging in effect that in addition to the purchase price he had reported, the purchaser had agreed to pay a larger sum to include his commission, etc., and had paid only the smaller sum, reported and confirmed, and refused to pay the balance as agreed after having received the deed from the clerk's office, where it had been deposited. It was held, upon demurrer, that the allegations of the petition must be considered as true, and it was reversible error for the trial judge to sustain the demurrer, and not require an answer to be filed to set the matters at issue for the purpose of proceeding to determine the controversy. *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242.

**When Court May Reopen Case.** — Where the commissioner for the private sale of lands for division has withheld from the knowledge of the court the actual price the purchaser has agreed to pay, and reported a lesser sum, which the court has confirmed by final judgment, it is an imposition on the court, and will not conclude it from reopening the case on the petition of the commissioner in the cause, after notice, and affording the proper relief. *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242.

**Partition of Land Where One Part Owner Missing.**—Where, in special proceedings for the partition of lands among the deceased owners, it is properly made to appear that one of them has been missing for twenty years or more and cannot be found, nor can it be ascertained

whether or not he had children or lineal descendants; that summons has been issued for him, returned not to be found and then notice by publication had been duly published for him or his descendants, without avail, Rev., 2490, and the interests of each of the parties has been duly ascertained and established; it is held, under a motion to collect the purchase money under Rev., 1524, bid by a purchaser at sale for divisions, that such purchaser may not successfully resist payment on the ground of a defect in title for that the commissioner's deed would not preclude the claims of the missing heir or his heirs; but that the decree should provide for the reinvestment or security of the share of the missing party or his real representatives, Rev., 2546, which however, in no wise affects the title to be conveyed. *Bynum v. Bynum*, 179 N. C. 14, 101 S. E. 527.

## ART. 25. SUBMISSION OF CONTROVERSY WITHOUT ACTION

### § 626. Submission, affidavit, and judgment.

**In General.**—In *Burton v. Durham Realty, etc., Co.*, 188 N. C. 473, 474, 125 S. E. 3, the court said:—"Speaking to a similar situation, in *McKethan v. Ray*, 71 N. C. 165, *Pearson, C. J.*, said: 'Our construction of section 315, C. C. P. (now this section) is that it does not confer upon certain parties, who differ as to their rights, to propound to the Court, on a case agreed, interrogatories in respect thereto, but that the purpose is simply to dispense with the formalities of a summons, complaint and answer, and, upon an agreed state of facts, to submit the case to the Court for decision, and thereupon the judge shall hear and determine the case and "render judgment thereon as if an action was depending."'"

**Interests Must Be Antagonistic.**—For the courts to pass upon a controversy submitted under the provisions of this section the interest of the parties must be antagonistic, and the case will be dismissed if it appears that the parties are one in interest, or desire the same relief. *Burton v. Durham, etc., Realty Co.*, 188 N. C. 473, 125 S. E. 3.

**Facts Showing No Cause of Action.**—Where the facts agreed in a controversy without action show no cause of action, an appeal from a judgment thereon will be dismissed in the supreme court, as where the plaintiff claims title under a deed, avers that her purchaser was prevented from accepting her deed by the claims of the defendants, without allegation of the facts and circumstances or setting forth sufficiently the terms of the deeds, or making her purchaser and other necessary parties, parties to her action, thus presenting a moot question which the court will not decide. *Waters v. Boyd*, 179 N. C. 180, 102 S. E. 196.

**Insufficient Statement.**—It is required that this section permitting the submission of controversy without action state in the affidavit that "the controversy is real and the proceedings in good faith to determine the rights of the parties," and this statute being strictly construed, the statement that the controversy is genuine and submitted to determine the rights of the parties, is fatally insufficient. *Waters v. Boyd*, 179 N. C. 180, 102 S. E. 196.

**Where Controversy May Not Be Considered.**—An action brought by the seller of a cotton-scale beam may not be maintained against the purchaser thereof in anticipation of the latter's claim for damages arising upon the breach of an implied warranty against defects that caused damage to the purchaser, and under this section upon demurrer the controversy may not be considered by the court as upon a case agreed. Equitable rights of bills of peace, quia timet, and to remove clouds on title to lands distinguished. *Jacobi Hdw. Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756.

**Consent Degrees Confer Title.**—See notes to § 608.



## Subchapter IX. Appeal

### ART. 26. APPEAL

#### § 630. Certiorari, recordari, and supersedeas.

**Discretion of Supreme Court.**—The granting or refusing of a petition for a certiorari, under the provisions of our Constitution, Art. IV, sec. 8, and this section passed in pursuance thereof, is a matter within the discretion of the Supreme Court, and will not be issued when it will serve no good purpose. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751.

**Refusal to Settle Case on Appeal.**—A writ of certiorari will not issue from the Supreme Court to bring up for review the action of the Superior Court judge in refusing to settle a case on appeal, when it appears that a judgment had been entered by the court upon the consent of the parties, such judgment being a waiver of the right of appeal. *Semble*, the only remedy is a motion in the lower court to set aside the judgment. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751.

#### § 632. Who may appeal.

**Administrators.**—Where issue has been joined before the clerk in proceedings by the administrator to sell lands of deceased to pay debts due by the estate, and upon transferring the cause to the trial court, the judge has ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assume the character of a creditor's bill in which a creditor whose claim has been disallowed, may appeal to the Supreme Court, under the express provisions of this section, as a party aggrieved. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

**Right to Defend Not Taken Away by Section 3288.**—The object of C. S. sec. 3288, is to protect creditors and third persons dealing with parties trading under assumed names from fraud and imposition; to enable them to know the real names of those with whom they deal. This object cannot be accomplished by taking away the right to defend an action. This would allow any person, not only to sue, but to recover, *ad libitum*, when the legislative intent is now limited to the punishment prescribed in C. S. sec. 3291. *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629.

#### § 633. Appeal from clerk to judge.

**Applicability of Statutes.**—"This section and section 635, and 636, regulating appeals from the clerk to the judge, are applicable to appeals from orders, and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to chapter 92, Public Laws 1921, Extra Session. These sections of consolidated statutes do not apply to orders and judgments made or entered by the clerk as authorized by this latter statute." *Caldwell v. Caldwell* (N. C.), 128 S. E. 329.

**Order to Sell Land for Debt.**—This section and section 637 apply to an appeal from an order of the clerk to sell lands of decedent to pay debts. *Perry v. Perry*, 179 N. C. 445, 448, 102 S. E. 772.

#### § 636. Duty of judge on appeal.

See notes to § 633.

**When Notice Not Reasonable.**—Where notice of appeal from action by the clerk is served on the day before the hearing, the notice is not reasonable within this section. *Byrd v. Nivens*, 189 N. C. 621, 127 S. E. 673.

**Rendering Decision Out of District.**—In *Byrd v. Nivens*, 189 N. C. 621, 127 S. E. 673, 674. The court said:—"We do not think that 'the

judge residing in the district or, in his absence, the judge holding the courts for the district' can hear the questions and render a decision out of the district.'"

### § 637. Judge determines entire controversy; may re-commit.

See notes to § 633.

**In General.**—If an action or proceeding is instituted before the clerk of which he has no jurisdiction, and on any ground is sent to the Superior Court before the judge, the judge has jurisdiction to retain and hear the cause as if originally instituted in the Superior Court. *Hall v. Artis*, 186 N. C. 105, 118 S. E. 901.

Where the clerk of the Superior Court has erroneously at once transferred the proceedings in condemnation to the Superior Court on issue joined between the parties, and an appeal therefrom has been taken to the Superior Court, the judge thereof acquires jurisdiction for the hearing and determination of the controversy under the provisions of this section, and may order other proper or necessary parties to be made for the further determination of the cause. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543.

**Question of Price of Land.**—The discretion vested in the Superior Court judge on appeal from the clerk, by this section, to hear and determine the matter in controversy, unless it appears to him that justice would be more cheaply or speedily administered by remanding it to the clerk, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority under C. S., 2591, to further pass thereon in the absence of an increased bill. *In re Mortgage Sale of Ware Property*, 187 N. C. 693, 122 S. E. 660.

**Where Tenant in Common Withholds Possession.**—The clerk of the Superior Court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, when one of the tenants wrongfully withholds possession from another, nor can jurisdiction be conferred on the Superior Court on appeal, the latter having no concurrent or original jurisdiction, under the provisions of this section, valid under the provisions of the Constitution of 1875. *Southern State Bank v. Leverette*, 187 N. C. 743, 123 S. E. 68.

### § 638. Appeal from superior court judge.

**Motion to Dismiss An Action.**—An appeal does not lie from the refusal of a motion to dismiss an action. *Capps v. Atlantic Coast Line R. Co.*, 182 N. C. 758, 108 S. E. 300.

**Removal of Public Officer.**—An appeal from proceedings in Superior Court to remove a public officer for willful misconduct or maladministration in office, is allowed by this section. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174.

### § 643. Case on appeal; statement, service, and return.

**History, Purpose and Scope of Section.**—"Prior to the adoption of the Reformed Procedure in 1868, all cases on appeal were settled by the judges, whose practice was to perform this duty before leaving the court at which the case was tried. It was thought that their duty in this respect might be lightened by changing the statute, so as to permit counsel to agree upon settlement of the case on appeal and to call in the aid of the judge only where counsel failed to agree. The time originally allowed for this purpose was five days for the appellant to serve case on appeal and three days for the appellee to serve a counter case. This was lengthened from time to time until by this section it is now fifteen days to



serve case on appeal and ten days to serve counter case, except where the parties by consent extend the time. The result has not been beneficial. There has been an increasing tendency to postpone and put off the settlement of cases on appeal by lengthening the time, and the last Legislature has permitted the judges to extend the time even when counsel do not agree. But this Court has never changed its rules, of which it is sole judge, that in every case when the case on appeal is not docketed in the time required, at the next term, the appellant must docket the record proper and ask for a certiorari. Whenever this is not done the case not docketed until the next succeeding term will be dismissed. *S. v. Telfair*, 139 N. C. 555 (2 Anno. Ed.), and cases there cited; *Buggy Co. v. McLamb*, 182 N. C. 762, 108 S. E. 344; *Rogers v. Asheville*, 182 N. C. 596, 109 S. E. 865; *State v. Johnson*, 183 N. C. 730, 713, 110 S. E. 782.

**Exception Taken After Trial.**—Exceptions to the judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of our statute, this section and 520(1). And an exception to a previous intimation of the judge made upon the trial to the effect objected to, is not required. *Cherry v. Atlantic Coast Line R. Co.*, 186 N. C. 263, 119 S. E. 361.

**When Assignment of Error Unnecessary.**—In *Redding v. Dunn*, 185 N. C. 311, 117 S. E. 26, it was said:—"Appellant doubtless has in mind the cases of *Bessemer Co. v. Hardware Co.*, 17 N. C. 728, 88 S. E. 867; *Greensboro v. McAdoo*, 112 N. C. 359, 17 S. E. 178; *Wallace v. Salisbury*, 147 N. C. 58, 60 S. E. 713, and others to like effect, holding that no assignment of error is necessary where there is but a single exception and this is presented by the record, nor where the case is heard below on an agreed statement of facts, nor when the exception to the judgment is the only one taken and the appeal itself is an exception thereto."

**Power of Judge to Enlarge Statutory Time.**—Before the amendment of this section by the acts of 1921, it conferred no power upon the trial judge to enlarge the statutory time for the service of appellant's and appellee's cases on appeal beyond that therein prescribed, and this formerly could only be done by the agreement of the parties; and the power conferred on him by the amendment is limited to his action during term, wherein the parties, being present, are put upon notice of their rights. *State v. Humphrey*, 186 N. C. 533, 120 S. E. 85.

## § 644. Settlement of case on appeal.

**Settlement of Case Where Tried.**—The trial judge has no absolute authority to settle a case on appeal outside of the county or district in which it was tried, under the provisions of this section, except by agreement of the parties, or when the counter case or exception had been served, respectively, within the time prescribed by the statute. *State v. Humphrey*, 186 N. C. 533, 120 S. E. 85.

## § 648. Notice of motion to dismiss; new bond or deposit.

**Failure to File New Bond.**—The bond required of appellant by this section is a condition precedent to his right to have his case heard and determined on appeal, and where, in response to appellee's motion to dismiss for failure to file the bond at least five days before the call of the district, the appellant fails to file a new bond according to law, or make a deposit, etc., appellee's motion to dismiss will be allowed. *Goodman v. Call*, 185 N. C. 607, 116 S. E. 724.

## § 650. Undertaking to stay execution on money judgment.

See notes to section 1534.

**When Surety Bound.**—Where the trial judge, upon sufficient findings, has properly adjudged that the defendant has abandoned his appeal to the Supreme Court, it is not required that the appeal should have been docketed and dismissed in the Supreme Court in order to bind the surety on his bond given to stay execution in accordance with the terms of this section. *Murray v. Bass*, 184 N. C. 318, 114 S. E. 303.

**Judgment Against Surety.**—Where an undertaking to stay execution on appeal to the Supreme Court has been given by the defendant against whom judgment has been rendered, under this section, and pending appeal he has been adjudicated a bankrupt in the Federal Court, an order properly entered dismissing the appeal with judgment against the surety on the undertaking rendered in the State court before the bankrupt's discharge, without suggestion of the pendency of the bankrupt proceedings, the judgment against the surety becomes fixed and absolute, according to the terms of the undertaking, which the bankrupt's subsequent discharge does not affect. *Laffon v. Kerner*, 138 N. C. 281, 50 S. E. 654, cited and distinguished. *Murray v. Bass*, 184 N. C. 318, 114 S. E. 303.

Where defendant's appeal to the State Supreme Court has been properly dismissed with judgment against the surety of defendant's undertaking to stay execution, under this section, before discharge in bankruptcy in proceedings then pending, the defendant and his surety on the undertaking are codebtors within the meaning of the bankrupt act, and thereunder the surety is not discharged from his obligation on the bond. *Murray v. Bass*, 184 N. C. 318, 114 S. E. 303.

In *Murray v. Bass*, 184 N. C. 318, 114 S. E. 303, it was said:—"A judgment of the Superior Court, upon proper finding that the appeal had been abandoned, would have the same effect, so far as the liability of the surety on the supersedeas bond is concerned, as an order of dismissal or judgment of the affirmance here. *Dunn v. Marks*, 141 N. C. 232, 53 S. E. 845; *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804; *Causey v. Snow*, 116 N. C. 497, 21 S. E. 179; *Avery v. Pritchard*, 93 N. C. 266. Indeed, the statute does not require that such affirmance be made by the appellate court."

## § 654. Docket entry of stay.

**Execution against Estates by Entireties.**—Estates by entireties exist in this State only as an incident to the marriage relationship of husband and wife, and execution may not issue to subject it to the payment of a judgment obtained against only the one or the other of them during their joint lives, but if one of them should die leaving surviving the other against whom judgments have been obtained and the liens thereof are presently existent, the right to issue execution against the estate formerly held by them in entireties attaches as to all at the time the survivor has acquired the full title and distribution of the proceeds must be made pro rata without reference to the time the judgments may have been obtained. *Johnson v. Leavitt*, 188 N. C. 682, 125 S. E. 490.

## § 655. Scope of stay; security limited for fiduciaries.

**Second Trial Pending Appeal Unlawful.**—Where the cause has been tried at a previous term of the court, and the judge has set aside the verdict under the appellants' exception, and, pending his due prosecution of his appeal, without laches on his part, the judge has forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial is contrary to this section and a new trial will be ordered on appeal. *Likas v. Lackey*, 186 N. C. 398.



**§ 657. Judgment not vacated by stay.**

**Final Assessment Invalid before Opinion Certified.**—In *Atlantic Coast Line R. Co. v. Sanford*, 188 N. C. 218, 219, 124 S. E. 308, the Court said:—"The defendants seem to have proceeded upon the assumption that it was not necessary to await the certification of the opinion rendered on appeal, but in this respect they were in error. They had no legal right to make a final assessment against the plaintiff's property before the opinion had been certified to the Superior Court and while the questions presented on the appeal were yet in fieri."

**§ 658. Judgment on appeal and on undertakings; restitution.**

Where a railroad company and the Director General of Railroads have both been joined as parties defendant in an action to recover for a negligent injury, and issues have been submitted as to each, and adverse verdict rendered as to each, there can be no prejudice to the Director General in dismissing the action as to the railroad company and affirming it as to the Director General, and the same may be done under the provisions of this section and 1412. *Kimbrough v. Hines*, 182 N. C. 234, 109 S. E. 11.

**§ 660. Appeal from justice heard de novo; judgment by default; appeal dismissed.**

See notes to § 661.

**Jurisdiction of Superior Court Derivative.**—An appeal to the Superior Court, from a justice of the peace confers only derivative jurisdiction on the Superior Court, depending entirely upon that of the justice's court from which the action was appealed, and in the absence thereof the Superior Court can acquire none. *Commissioners v. Sparks*, 179 N. C. 581, 103 S. E. 142.

**Appeal Lost through Default of Appellant.**—The provisions of this section, as to the writ of certiorari, have no application where an appeal from the justice's court has been lost through the default of the appellant, and the failure of the appellee to docket and dismiss is no waiver of the appellee's rights upon appellant's motion for a certiorari. *Pickens v. Whitton*, 182 N. C. 779, 109 S. E. 836.

**Failure of Justice to Send up Papers.**—The sending up an appeal to the Superior Court by the justice of the peace upon the payment of the cost is a judicial act, and no action for damages will lie against him for failing to send up the papers in apt time. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353.

**Failure of Defendant to Docket Case.**—Where the defendant has appealed from a judgment in a justice's court, and has failed to docket his case at the next term of the Superior Court commencing ten days or more after the rendition of the judgment, in order for him to obtain a recordari from the Superior Court he must move therefor at the earliest moment, and also show a meritorious defense. *Pickens v. Whitton*, 182 N. C. 779, 109 S. E. 836.

**§ 661. Appeal from justice docketed for trial de novo.**

**Failure of Appellant to Docket Appeal in Apt Time.**—Under this section it is appellant's duty to docket his appeal in the Superior Court in time, and his failure to have done so by the next succeeding term of the Superior Court, wherein the motion of appellee to dismiss has been properly allowed, or to apply for a recordari, in apt time, in his own laches, which will prevent his recovering damages of the justice of the peace for his failure to send up the case according to his promise, after having accepted his fee therefor, in the absence of a fraudulent intent. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353.

**Subchapter X. Execution.****ART. 27. EXECUTION****§ 663. Judgment enforced by execution.**

**Remedies of Judgment Creditor.** — Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may proceed against the debtor in personam, may compel payment by proceeding in rem, or pursue both remedies at the same time. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

**Debtor's Funds in Hands of Third Person.** — Where it appears, in proceedings supplementary to execution, that a third person has funds of defendant available for the judgment debt, etc., and order may be made by the court forbidding such third persons to dispose of the fund. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

**§ 673. Against the person.**

**Effect.** — In *Coble v. Medley*, 186 N. C. 479, 481, it was said: — "C. S., 768 (1), authorizes an arrest and holding to bail, among other cases, 'where the action is for injury to person or character;' and C. S., 673, authorizes an execution against the person of the judgment debtor 'if the action is one in which the defendant might have been arrested.' In such case the person arrested may be discharged, after judgment and without payment, only by surrendering all of his property in excess of \$50. *Fertilizer Co. v. Grubbs*, 114 N. C. 470. The effect of an execution against the person of the judgment debtor, therefore, is to deprive the defendant in the execution of his homestead exemption and of any personal property exemption over and above \$50."

**Liability in Damages For Malicious Prosecution.** — "Where a trial court of competent jurisdiction has regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant has been taken into custody under this section the plaintiff in said action is not liable in damages in defendant's subsequent action for malicious prosecution, though the verdict and finding of the jury or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. *Overton v. Combs*, 182 N. C. 4, 108 S. E. 357

Where a court of competent jurisdiction has, upon orderly procedure and sufficient evidence, entered judgment against the defendant in the action and ordered execution against his person, as provided in this section and accordingly the defendant has been arrested, the subsequent recalling of the execution or setting aside of the judgment in the course and practice of the courts, for irregularity, do not of themselves so disturb the facts established or the judgments rendered thereon as to permit the defendant thereafter to maintain his action for malicious prosecution against the plaintiff in the former one. *Overton v. Combs*, 182 N. C. 4, 108 S. E. 357.

The complaint in an action in a court of competent jurisdiction alleged an indebtedness of defendant to the plaintiff; and that defendant had disposed of an amount of personal property embraced in a mortgage securing the debt, with the purpose of hindering, delaying, and defrauding the plaintiff in the collection of the debt, and the action proceeded to judgment upon competent evidence as to each allegation in the plaintiff's favor, under which the defendant was taken into custody pursuant to this section under personal execution after execution against his property had been returned unsatisfied. It was held, to establish existence of probable cause and to conclude the defendant's subsequent action to recover damages for malicious prosecution against the plaintiff in the former action. *Overton v. Combs*, 182 N. C. 4, 108, S. E. 357.



## ART. 28. EXECUTION AND JUDICIAL SALES

**§ 687. How advertised; cost of newspaper publication.**

**Applicable to Execution and Judicial Sales.**—It seems to be settled law in this State that this section as regards the notice at the courthouse door and three other public places in the county for 30 days immediately preceding the sale and also published once a week for four weeks in a newspaper published in the county applies to execution and judicial sales of real estate. It is a matter of contract under deed of trust, mortgage, etc., of real estate. *Hogan v. Utter*, 175 N. C. 332, 95 S. E. 565, and cases cited. *Douglas v. Rhodes*, 188 N. C. 580, 582, 125 S. E. 261.

**The time of sale of lands**, under the power in a mortgage, must be in accordance with the notice thereof, as given or named in the advertisement and as required so that there may be fair and competitive bidding, for otherwise the sale will be declared void. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207.

## ART. 29. BETTERMENTS

**§ 699. Petition by claimant; execution suspended; issues found.**

**One holding under a tenant for life**, making substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made. *Harriett v. Harriett*, 181 N. C. 75, 106 S. E. 221.

**When Not Entitled to Value of Improvements.** — One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. *Eaton v. Doub* (N. C.), 128 S. E. 499.

**§ 700. Annual value of land and waste charged against defendant.**

**The usual rule** is undoubtedly that one claiming betterments is chargeable with rents, even beyond the three years, as an offset against a recovery for the improvements but this is because generally the owner of the land at the time of its recovery also owns the rents, and the law gives to each what belongs to him. It awards to the owner the land and his rents, and to the occupant the value of his improvements. *Harriett v. Harriett*, 181 N. C. 75, 78, 106 S. E. 221.

**Rents and Profits Not Recoverable.**—When one holding under the tenant for life by deed apparently conveying the lands in fee after her death, is entitled to betterments, and he or the life tenant have received the rents and profits until that time, the remaindermen, after the death of the tenant for life are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. *Harriett v. Harriett*, 181 N. C. 75, 106 S. E. 221.

**§ 701. Value of improvements estimated.**

**In General.** — In *Pritchard v. Williams*, 181 N. C. 46, 50, 106 S. E. 144, it was said:—"The sole matter for consideration is embraced in one proposition, and that is, 'How much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same?'"

In *Pritchard v. Williams*, 181 N. C. 46, 50, 106 S. E. 144, the Court said:—"Certain acts which amidst certain surroundings and condi-

tions might enhance the property permanently in other surroundings and conditions would add nothing to its permanent value. There are ordinarily matters for the jury, and no general rule can be laid down more definite than that above stated."

**Wishes of Remainderman Immaterial.**—Where it has been judicially determined, in an action of ejectment, that the defendant is entitled to recover for betterments placed thereon, while bona fide believing that he was owner of the fee, when he was, in fact, tenant for life, the wishes of the remainderman as to the kind or nature of the improvements, or whether they will be useful to him, is immaterial, the question for the jury to determine upon the evidence being the value of such improvements as were permanent and substantially increased the value of the land, not exceeding the cost. *Pritchard v. Williams*, 181 N. C. 46, 106 S. E. 144.

**Evidence of Improvements.**—When the unsuccessful defendant in an action of ejectment may recover as betterments for improving farm lands in which he had a life estate only, it is competent for him to show that the land had been depleted and remained idle for a period of time, and by his expenditures in a systematic plan of unusual fertilizing, clearing the lands of trees, ditching, building of fences, etc., with a bona fide and reasonable belief that he owned the fee, he had brought the land to a high state of cultivation; and it is for the jury to determine whether the land had been substantially and permanently improved thereby, and if so, the added value. *Pritchard v. Williams*, 181 N. C. 46, 106 S. E. 144.

**Recovery by Trustee of Bankrupt.**—The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another with his consent, in fraud of the rights of his creditors, may recover under this section as for betterments, the value of the improvements to the land, but not a greater amount so expended, which will be a lien upon the lands; and a judgment that if it be not paid at a certain date the land be sold for cash, after due advertisement, by a commissioner appointed by the court, is correctly entered. *Garland v. Arrowood*, 179 N. C. 697, 103 S. E. 2.

## ART. 30. SUPPLEMENTAL PROCEEDINGS

### § 711. Execution unsatisfied; debtor ordered to answer.

See notes of *Boseman v. McGill* under § 719.

**Choses in Action Not Subject to Seizure.**—At common law, choses in action were not subject to seizure and sale under final process of execution, and except and to the extent the same have been modified or changed by statute, this rule still prevails. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535.

Except in case of attachment proceedings, wherein provision is made for exceptional and urgent cases, choses in action can only be made available to the creditor by civil action in the nature of an equitable *fi. fa.*, or by the statutory method of supplemental proceedings, both of which methods, in this jurisdiction and in proper instances, are still open to claimants. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535.

**Same—Collateral Notes Held by Bank.**—In proceedings supplemental to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms hypothecation, when the same have matured, and when not matured, and it has an equitable right of set-off when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold which specifically affects the property. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535.



Where it has been determined in proceedings supplemental to execution that there are certain notes made payable to the judgment debtor, some of which he has hypothecated with a bank as collateral to his own notes given thereto, a levy of the sheriff, by virtue of the writ therein, requiring that the bank turn over and deliver to him all such of the collaterals as may be sufficient to satisfy the judgment in a certain amount, is inoperative and ineffectual. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535.

A judgment creditor, in pursuing the remedy allowed by this section acquires no lien upon the choses in action of the judgment debtor held by a bank as collateral by the issuance of notice, this being shown by perusal of section 714, providing for the arrest and bond, on proper affidavit, etc.; section 717, for an order of the judge, without arrest, for bidding the transfer of the judgment debtor's property, etc.; section 723, for the appointment of a receiver, etc. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535.

**Same—Right of Bank to Deposits.**—A bank may apply the deposits of its customer to the payment of his note after maturity, by way of set-off, unless some other creditor has in the meantime acquired a superior right thereto in some way recognized by the law and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of his right. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535.

### § 714. Debtor leaving state, or concealing himself, arrested; bond.

See note of *McIntosh Grocery Co. v. Newman* under § 711.

### § 717. Disposition of property forbidden.

See note of *McIntosh Grocery Co. v. Newman* under § 711.

### § 719. Debtors of judgment debtor, summoned.

**Where Land Sale Does Not Satisfy Judgment.**—Where, upon the report of commissioners to sell land at a judicial sale subject to a lien, it appears that the land brought a fair and reasonable price, which was found as a fact by the clerk, and the order of sale confirmed by the judge, and it further appears that the price so obtained was less than the amount of the judgment, the judgment creditor may obtain an order, in proceedings supplementary to execution, upon proper affidavit, by showing that execution had been issued, though not then returned, and that the judgment debtor had property available in the hands of a third person, subject to the payment of the judgment debt, and which he unjustly refuses to apply thereto. C. S., 711, does not apply to the facts of this case. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

### § 721. Debtor's property ordered sold.

**Order for Examination of Debtor Proper.** — Under the facts of the instant case, an order for the examination of the judgment debtor and others, in proceedings supplementary to execution, was properly made under the provisions of this section. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

**Objection As to Property of Defendant.** — Objection that the plaintiff, in proceedings supplementary to execution, has not shown, in support of the order to examine the defendant and others, that the defendant had no other property, etc., cannot be sustained when this averment is made in the plaintiff's affidavit, without denial. *Farmers, etc., Nat. Bank v. Burns*, 109 N. C. 105, 13 S. E. 817, cited and approved. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

**Clerk's Finding of Fact Sufficient.** — Where, upon the plaintiff's affi-

davit, the clerk finds as a fact that execution under the judgment had been issued, in proceedings supplementary to execution, it is sufficient to sustain his order in that respect for the examination of the defendant and others, etc., which the lack of the return of the execution does not affect. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10.

## Subchapter XI. Homestead and Exemptions

### ART. 31. PROPERTY EXEMPT FROM EXECUTION

#### § 728. Property exempted.

See note of *McIntosh Grocery Co. v. Newman* under § 711.

#### § 729. Conveyed homestead not exempt.

**Conveyance without Joinder of Wife.**—"Unless the homestead is 'allotted and occupied' the conveyance without the joinder of wife is valid except as to the dower interest." *Dalrymple v. Cole*, 181 N. C. 285, 288, 107 S. E. 4.

## Subchapter XII. Special Proceedings

### ART. 32. SPECIAL PROCEEDINGS

#### § 763. Reports of commissioners and jurors.

**Proceedings to Sell Land Appealable.**—A proceeding to sell lands to make assets to pay the debts of the deceased, under this section, is appealable from the clerk of the Superior Court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772.

**Same—Jurisdiction of Judge.**—The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person has sold them several times under resales ordered by the clerk of the Superior Court, and that the clerk has granted the purchaser's motion to confirm the sale after the lapse of more than twenty days from the last sale, without an advanced bid until after the expiration of that time, does not affect the jurisdiction of the judge on appeal to examine into the matter and order another resale upon being satisfied that justice and the rights of the parties require it. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772.

## Subchapter XIII. Provisional Remedies

### ART. 33. ARREST AND BAIL

#### § 767. Arrest only as herein prescribed.

**Where Judgment of Nonsuit Reversed.**—Where there has been a motion for an order of arrest and bail under this section, and a judgment of nonsuit is reversed, the motion may be reviewed. *Hensley v. Helvenston*, 189 N. C. 636, 127 S. E. 625.

#### § 768. In what cases arrest allowed.

**Arrest for "Willful Injury."**—For the arrest of a woman under the provisions of this section, for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference to the rights of others. *Weathers v. Baldwin*, 183 N. C. 276, 111 S. E. 183.

Evidence tending to show that the defendant in the action, a woman,



was driving an automobile near the center of a large and populous town on Sunday, at the time the people were going to church, and with a speed in excess of that allowed by law, and without signal or other warning ran upon the sidewalk where the plaintiff was and struck with the machine and injured him, and apparently gave him no further thought, is sufficient for the jury to find an intent on the defendant's part to have willfully injured the plaintiff, and for the defendant's arrest under the provisions of this section. *Weathers v. Baldwin*, 183 N. C. 276, 111 S. E. 183.

#### ART. 34. ATTACHMENT

### § 798. In what actions attachment granted.

**Death by Wrongful Act.**—The history of legislation as to attachments culminating in this section, shows a legislative intent to broaden the right of this writ to make the same well-nigh coextensive with any well-grounded demand for judgment in personam, and is sufficiently comprehensive to include the action for "causing the death of another by wrongful act, neglect, or default of another." *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

A recovery for a wrongful death allowed by C. S., 160, depending upon the question of self-defense in case of willful injury, and on contributory negligence in case of "negligent act," or upon settlement of the damages in his lifetime by the one injured, shows that it was in the contemplation of the state that the "injury to the person" should continue after his death to be a constituent part of the statutory action allowed to the personal representatives, and comes within the provisions of this section, affording the remedy by attachment for the injury to the person by negligent or wrongful act. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

**An intervener in an action** wherein attachment on defendant's property has been issued, and who claims a prior lien by reason of a former order of court in another and independent proceeding, becomes party to the present action and may not successfully attack the validity of the proceedings in attachment, and the question of priority is left to be determined in the present action. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

Where the wife has obtained an order for support from her husband, declared a lien on his property, C. S., 1667, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process, or waiver by her husband in an appropriate civil action against him. Whether the lien of the wife will in any event prevail as against the lien of a valid attachment first levied in another court of equal or concurrent jurisdiction, *Quaere?* *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

### § 799. Affidavit must show what.

**Basis of Belief.**—The affidavit upon which a warrant of attachment has been issued is fatally defective which alleges that the defendant is about to assign, dispose of and secrete the money or goods with intent to defraud creditors without setting forth the grounds upon which this belief is based so as to enable the court to adjudge of their sufficiency. *First Nat. Bank v. Tarboro Cotton Factory*, 179 N. C. 203, 102 S. E. 192.

**Allegations in affidavits for attachment against an insolvent corporation's property**, that executions had been issued against it, and that it had failed to make use of a small piece of its land, and not paid the taxes thereon; or that its president claimed this land, or its proceeds are insufficient upon the question of fraud of the corporation, for the granting of the warrant. *First Nat. Bank v. Tarboro Cotton Factory*, 180 N. C. 128, 104 S. E. 129.

**§ 802. Time of issuance; service of summons.**

See notes to § 806.

**When Summons Unnecessary.**—In proper instances, where civil actions are commenced and service is obtained by attachment of defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons at the commencement of the action is unnecessary. *Jenette v. Hovey & Co.*, 182 N. C. 30, 108 S. E. 301.

**§ 805. To whom warrant directed; duty of officer.**

**Warrant Issued to Constable Instead of Sheriff.**—An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

**Clerical Error in Warrant.**—A warrant in attachment, in substantial conformity with this section, and, in fact, executed by the deputy sheriff of the proper county, is valid, and will not be held otherwise when verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments being plenary under the provisions of C. S., sec. 549. *May Co. v. Menzies Shoe Co.*, 186 N. C. 144, 119 S. E. 227.

**§ 806. Notice; service and content.**

**Failure to Order or Make Service.**—Where an affidavit, filed in an action wherein attachment is sought against the property of a nonresident within the jurisdiction of the court, is sufficient for the clerk to order service of the summons by publication, but service has not been ordered or made, and the cause has come up on defendant's special appearance and motion to dismiss on that ground, and pending the motion the plaintiff, upon an additional affidavit, without the knowledge of the judge, has obtained an order of publication from the clerk, it is within the sound discretion of the judge to permit the publication of the summons to be proceeded with, and deny the defendant's motion. *Jenette v. Hovey & Co.*, 182 N. C. 30, 108 S. E. 301.

**§ 814. Defendant may apply for discharge and delivery of property.**

**Bond in Lieu of Attachment Lien.**—Where attachment has been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver is permitted by the court to continue operations, the giving of the bond is in lieu of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by this and the following section; and he may not take advantage of the bond by continuing to ship his property thereunder beyond the jurisdiction of the court, and thereby repudiate it. *Martin v. McBryde*, 182 N. C. 175, 108 S. E. 739.

**§ 815. Defendant's undertaking.**

See note to § 814.

**Surety Concluded from Asserting Insufficiency of Bond.**—Where judgment by default final has been rendered against the principal debtor and the surety on an attachment bond given in the action, in the form required by this section, to secure whatever judgment may be rendered, and the property attached has accordingly been retained by the debtor, the surety is concluded from asserting the insufficiency of the bond in



not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto. *Thompson v. Dillingham*, 183 N. C. 566, 112 S. E. 321.

### § 816. All property liable to attachment.

**Property Absorbed by Nonresident Corporation.**—Where a nonresident express company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor) company in the one continuing to do business here is subject to attachment under the provisions of C. S., 816, 817, 819 et seq., where the cause of action arose here; and the fact that the certificates of stock are not physically in the jurisdiction of the courts of this State is immaterial. *Parks-Cramer Co. v. Southern Exp. Co.*, 185 N. C. 428, 117 S. E. 505.

### § 821. Garnishee denying debt; issue tried.

**Garnishee a Mere Stakeholder.**—The requirement of this section that an issue shall be made up and determined by the jury where the garnishee in attachment denies owing the principal defendant, should be construed with C. S., 460, requiring the making of all necessary parties to a full determination of the controversy; and it does not apply when the garnishee takes the position of a mere stakeholder and sets up in his answer that another, not a party to the action, is the owner of the funds attached, and asks that such other person be brought in so as to protect it, the garnishee, in the payment of the funds under an order of the court. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

### § 826. On defendants' recovery, bonds and property delivered to him.

**Bank a Mere Stakeholder.**—Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the funds attached in its hands. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

### § 827. Motion to vacate or increase security.

**As to appeal from order of clerk denying motion to increase security** see note to §§ 635, 636.

### § 829. Interpleader.

**Defendant Holding Property as Agent.**—Where the evidence tends to show that a defendant holds property levied on as agent for another, such third person should be allowed to be made a party. *Farmers' Bank, etc., Co. v. Murphy*, 189 N. C. 479, 127 S. E. 527.

## ART. 35. CLAIM AND DELIVERY

### § 830. Claim for delivery of personal property.

**Action of Consignee against Carrier.**—The consignee of an interstate carrier of goods, in his action for damages thereto against the delivering carrier, sued out an attachment, and the carrier replevied, and thereafter the plaintiff sued out a writ of attachment in his action against the

foreign, initial carrier, and the delivering carrier, and it appears that upon the trial both actions and the proceedings thereunder were consolidated and dismissed for the failure of the plaintiff to plead or prove a tender of payment of freight, war tax, and demurrage. It was held that the plaintiff not having abandoned the shipment, and not suing for its full value, but for damages alleged to have been caused by the carrier's negligence, should have been permitted to proceed on his claim therefor, though not entitled to the immediate possession of the shipment. *Bradshaw & Co. v. Boston, etc., R. Co.*, 183 N. C. 264, 111 S. E. 515.

### § 836. Defendant's undertaking for replevy.

See note to § 830.

**Liability of Sheriff.**—When the sheriff of the county retains possession of the goods replevined in claim and delivery under C. S., 3403, instead of surrendering possession to the plaintiff who has given the replevin bond prescribed by this section, the status of his possession is changed from that of a custodian of the law, and his liability is to be determined under the provisions of this section, and those of his official bond, and he is responsible for the loss of the goods when destroyed by fire in his possession, irrespective of any question of negligence on his part in keeping it. *Motor Co. v. Sands*, 186 N. C. 732, 120 S. E. 459.

**Liability of Surety.**—The principle, applying to ordinary contracts, that a surety is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of this section, where the defendant retains possession of the property the subject of claim and delivery by reason of the bond, and under its conditions, and thereafter a judgment by consent of the parties is entered by the court; and where the consent judgment stays execution for sixty days, and in that time the defendant upon whom the judgment places liability has disposed of the same, the surety remains liable to the extent of his principal's obligation. *Wallace & Sons v. Robinson*, 185 N. C. 530, 117 S. E. 508.

The sureties on a replevin bond are considered as parties of record within the limits of their obligation, under this section and by becoming surety they duly constitute their principal, the defendant in the action, as their agent with power to bind them by their compromise or adjustment of the matter in any manner within the ordinary and reasonable purview of the action, and to have the same evidenced, secured, and enforced by final process in the cause; and he is bound by a judgment entered therein by consent of the parties, though without his knowledge, for the liability therein imposed on his principal to the extent of the undertaking he has signed as such surety. *Wallace & Sons v. Robinson*, 185 N. C. 530, 117 S. E. 508.

The surety on a replevin bond in claim and delivery, under the requirements of this section that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, etc., may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by the act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. *Garner v. Quakenbush*, 188 N. C. 180, 124 S. E. 154.

The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case. *Wallace & Sons v. Robinson*, 185 N. C. 530, 117 S. E. 508.

**Usurious Note Procured by Mortgage.**—Where it is established by the verdict in claim and delivery that the mortgagor had sold to the defendant an automobile subject to the plaintiff's registered mortgage, without express or implied waiver of the plaintiff's lien, and that the



note procured by the mortgage was tainted with usury, C. S., 2306, the judgment should direct a sale of the mortgaged automobile, and payment of principal without interest to the plaintiff, and surplus, if any, to defendant after deducting costs; and, also, payment of any damages for deterioration or detention caused by the defendant's use of the car held by him under replevy bond, after the bond of plaintiff in claim and delivery was given by him. *Rogers v. Booker*, 184 N. C. 183, 113 S. E. 671.

**Measure of Damages for Breach of Warranty.**—Where the defendant has breached his contract of warranty of horses which he had traded for the plaintiff's mules, and thereupon the plaintiff had taken the horses home and kept them, the upkeep of the horses about equaling the benefit the plaintiff derived therefrom; and in plaintiff's action to recover possession with ancillary remedy of claim and delivery, the defendant kept and sold the mules under a replevy bond. It was held that there being no allegation in the complaint except for the detention of the mules, the measure of damages for the plaintiff is the difference between the ascertained value of the mules and horses, and interest thereon. *Burger v. Cooper*, 179 N. C. 140, 101 S. E. 547.

### § 840. Property claimed by third person; proceedings.

**When Garnishee Bank a Mere Stakeholder.**—Where funds of a non-resident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

**Same—No Bond Required.**—The bond required of an intervener by this section, has no application in attachment where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same for the adjudication of the court between two conflicting claimants. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162.

**Sufficiency of Intervener's Motion.**—A landlord, intervening in an action of the mortgagee of a crop raised by the tenant on the intervener's land and covered by the plaintiff's mortgage, is permitted only to raise the issue as to his superior lien over that of the mortgagee, and not required to be otherwise plead in the action; and when the intervener's motion is sufficient in this respect, under this section, it is reversible error for the trial judge to render a judgment by default for the want of intervener's answer, the procedure, if desired, being to require the intervener to make his motion more specific, or file an answer to that effect. *Hill v. Patillo*, 187 N. C. 531, 122 S. E. 306.

## ART. 36. INJUNCTION

### § 855. Damages on dissolution.

**Injunction Sought with Malice.**—Rev., 817 (C. S., 854), requiring bond in injunction to cover defendant's damages, and this section, providing for the recovery thereof in the same action, does not limit the remedy to that action, in the event the injunction was sought with malice and without probable cause; and defendant has the right therein to elect between this remedy and that by independent action, without limiting his recovery to action on the bond when the damages sought are in excess of that amount. *Shute v. Shute*, 180 N. C. 386, 104 S. E. 764.

### § 856. Issued without notice; application to vacate.

**Time within Discretion of Judge.**—The time when the affidavits of defendants should be filed and the granting of continuance in injunction

cases, is largely within the discretion of the judge. *Tobacco Growers Co-op. Ass'n v. Harvey & Son Co.*, 189 N. C. 494, 127 S. E. 545.

### § 858. To restrain collection of taxes.

**Remedy Cumulative.**—Under the provisions of C. S., 7979, a taxpayer may pay the tax assessed by the proper county agents under protest, and bring an action at law to recover the amount so paid upon the ground of its illegality, having observed the statutory provisions as to time, notice, etc., or he may apply for injunctive relief under this section upon the ground of the illegality or invalidity of the assessment so made, or that it was for an unauthorized purpose. *Norfolk-Southern R. Co. v Board*, 188 N. C. 265, 124 S. E. 560.

## ART. 37. RECEIVERS

### § 860. In what cases appointed.

See note of *Jones v. Jones* under section 495.

**In General.**—Where the plaintiff makes it properly to appear to the court that he is in imminent danger of loss by defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by defendant pending the action, or that the defendant is insolvent, and it must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. Other instances pointed out by *Walker, J. Kelly v. McLamb*, 182 N. C. 158, 108 S. E. 435.

**Property Threatened by Fraud and Insolvency.**—Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. *Peoples Nat. Bank v. Waggoner*, 185 N. C. 297, 117 S. E. 6.

**Clerk Hire Prior to Appointment.**—No preference is given either at common law or in equity, or by statute, for clerk hire in a store for services rendered prior to the appointment of a receiver for the owner, on application of creditors, C. S., 859, 869, 1113 (6), and no permissible interpretation in favor of such a preference can be derived by analogy to our statutes applying to a voluntary assignment for the benefit of creditors. C. S., 1609, 1618, or the other sections of chapter 28. *Mascot Stove Mfg. Co. v. Turnage*, 183 N. C. 137, 110 S. E. 779.

**Upon Application for Injunction.**—Under the broad terms of this section the court has power to appoint a receiver, upon an application for an injunction where it appears that this action will best serve the interests of both parties. *Hurwitz v. Carolina Sand, etc., Co.*, 189 N. C. 1, 126 S. E. 171.

**Receivership Cost.**—Where it appears that the defendant is insolvent and has left the State to avoid his creditors, including the plaintiff, and that a part of his property consisted of a cotton gin and planing mill and machinery purchased by him under a conditional bill of sale, duly recorded and constituting a first lien thereon, and the seller has acquiesced in an order appointing a receiver, and that he insure the property or employ a watchman to guard against its destruction by fire, the preservation of the property inures to the benefit of the seller holding the lien, and he may not successfully complain, either at law or in equity, of an order of court that he pay his proportion of the receivership cost and expenditures for the preservation of the property, especially as the receiver was appointed with his consent. *Kelly v. McLamb*, 182 N. C. 158, 108 S. E. 435.



**Subchapter XIV. Actions in Particular Cases****ART. 39. MANDAMUS****§ 867. For money demand returnable at term.**

An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agents regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes directly applicable, C. S., 1400, 3205, 3206, 4385, is not in strictness a money demand, under this section which must be proceeded with an ordinary civil action, requiring a finding of disputed facts by a jury, but comes under section 868, providing that the summons may be returnable before the judge at chambers or in term, who shall determine all issues of law and fact unless a jury is demanded by one or both of the parties, which, in the instant case, comes too late, being taken for the first time without exception in an additional brief allowed to be filed after the argument of the case in the Supreme Court has been made. *Tyrrell County v. Holloway*, 182 N. C. 64, 108 S. E. 337.

**§ 868. For other relief returnable in vacation; issues of fact.**

See notes to section immediately preceding.

**Where Only Evidentiary Matters Raised.**—When the answer and affidavits of a railroad company in mandamus proceedings by a city to enforce its ordinance requiring the railroad to change from a grade crossing with its street to an underpass, raises only evidentiary matters on the controlling issues, or as to the extent of the dangerous conditions requiring the change, no issues are raised requiring the intervention of the jury, and the judge before whom the proceedings are returnable will determine the matter. *Durham v. Southern R. Co.*, 185 N. C. 240, 117 S. E. 17.

**ART. 40. QUO WARRANTO****§ 870. Action by attorney general.**

**Contested Seat in General Assembly.**—The Constitution of our state withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly, and an action in quo warranto will not lie under this section. *State v. Pharr*, 179 N. C. 699, 103 S. E. 8.

The facts found by the referee as to the result of an election in proceedings in the nature of a quo warranto, and approved by the trial judge, are not subject to review on appeal when supported by competent evidence. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

The question of fraud in the returns of the county board of canvassers as to those voting in an election, in proceedings in the nature of a quo warranto, to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds the absence of fraud, upon competent evidence. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

**ART. 41. WASTE****§ 889. For and against whom action lies.**

**Conflicting Evidence as to Title.**—In an action of trespass and damages for the unlawful cutting and removing of timber upon the plaintiff's lands, there was evidence of plaintiff's and defendant's chain of title from a common source, and that one of the deeds under which the defendant claims was only of a life estate, but that through inadvertence or mutual mistake this should have conveyed the fee. The defendant was in pos-

session and claimed title by adverse possession under color of this deed. It was held that the defendant's motion as of nonsuit under the conflicting evidence was improperly allowed upon the principal that if a life estate were outstanding, his possession, during its continuance, would not be adverse to the plaintiff; and the action should be retained under the provisions of this section. It was held further, that while the evidence in this case as to location of the land was merger it is sufficient. *Howell v. Shaw*, 183 N. C. 460, 112 S. E. 38.

## Subchapter XV. Incidental Procedure in Civil Actions

### ART. 43. COMPROMISE

#### § 895. By agreement receipt of less sum is discharge.

**In General.**—Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties of compromising the matter in dispute between them, and accepting its benefits. *Walker v. Burt*, 182 N. C. 235, 109 S. E. 43.

Under a uniform construction of this section, as announced in a long line of decisions, it is held with us that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or make a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. *Blanchard v. Edenton Peanut Co.*, 182 N. C. 20, 21, 108 S. E. 332.

**Acceptance of Check.**—Under this section the acceptance of a check indorsed as a full settlement of accounts, precludes a claim that the amount due was more than the amount of the check. *De Loache v. De Loache*, 189 N. C. 394, 127 S. E. 419.

**Landlord and Cropper.**—Where the cropper sues for damages arising from the breach by the landlord of his contract to furnish certain lands for cultivation, selling plaintiff's crops without accounting for the proceeds, and retaining more of the crops than he was entitled to for the rent, and there is evidence on the trial of full accord and satisfaction between them, the submission of the one issue as to the compromise and settlement will not be considered for error when the case has thereunder been presented to the jury, without prejudice to any of the appellant's rights. *Walker v. Burt*, 182 N. C. 325, 109 S. E. 43.

**Agreement as to One Item Not Satisfaction of Another.**—Where the plaintiff's damages, caused by the defendant's breach of contract, are based upon two distinctive items, one for the loss he has sustained in preparing to fulfill his part of the contract, and the other for the loss or profits he would have received except for the defendant's breach, the plaintiff's agreeing upon and receiving compensation for the first item does not preclude a recovery upon the second one, under the provisions of this section relating to compromises or by a receipt he has given therefor, when it appears that the settlement had been made in contemplation of the first item alone, without reference to the second, the subject of the action. *Garland v. Linville Improvement Co.*, 184 N. C. 551, 115 S. E. 164.

### ART. 44. EXAMINATION OF PARTIES

#### § 900. Adverse party examined.

**Sufficiency of Affidavit.**—An affidavit in support of a motion in the cause to allow the plaintiffs to examine the defendant adversely under the provisions of this section, showing that the defendant had assumed to manage the estate of a deceased person of whom the plaintiffs were the heirs at law, under a paper-writing purporting to be a will, but which had been set aside by the court upon caveat entered, and that this was the only available way in which certain information necessary in the action could



be obtained, etc., is held sufficient to sustain the order of examination allowed by the clerk and approved by the judge of the Superior Court, and defendant's appeal is accordingly dismissed in the Supreme Court. *Jones v. Union Guano Co.*, 180 N. C. 319, 104 S. E. 653, cited and distinguished. *Whitehurst v. Hinton*, 184 N. C. 11, 113 S. E. 500.

**Testimony Taken Before Trial.**—It is competent for a party who has been examined under the provisions of the statutes before the trial of the cause, at the instance of the adverse party, to introduce the testimony so taken as evidence in his own behalf at the trial. *Beck v. Wilkins-Ricks Co.*, 186 N. C. 210, 119 S. E. 235.

**An appeal will not directly lie to the Supreme Court** from an order of the Superior Court judge affirming the action of the clerk in ordering the examination of the defendant to elicit certain information, alleged to be not otherwise obtainable, and material to the filing of the complaint, (this section), when it does not appear that the defendant will be prejudiced or injured by the examination. *Monroe v. Holder*, 182 N. C. 79, 108 S. E. 359.

#### ART. 45. MOTIONS AND ORDERS

### § 912. Notice of motion.

**Failure to Give Notice.**—When a judgment by default final has been entered against a defendant for the want of an answer, and it appears that the defendant lodged his motion in apt time for a change of venue in accordance with the provisions of C. S., 470, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days notice of his motion, required of this section, before time for answering has expired, will not affect his rights to have the judgment by default against him vacated. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728.

### § 913 (a). Orders by clerk on motion to remove; right of appeal; notice.

All motions to remove as a matter of right shall be made before the clerk, who is authorized to make all necessary orders, and an appeal shall lie from such order upon such motion to the judge [at chambers or] at the next term, who shall hear and pass upon such motion *de novo*. [But no such motion shall be heard until ten days notice thereof shall first have been given to the opposing party or his attorney.] (Ex. Sess. 1921, c. 92, s. 15; 1925, c. 282, s. 1.)

See notes of *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728, under § 470.

### § 913 (b). Motions to remove to federal court; notice.

Motions to remove to the federal court shall be made before the clerk, and an appeal shall lie from his order to the judge [at chambers] at the next term, who shall hear and pass upon such motion *de novo*. [But no such motion shall be heard until ten days notice thereof shall first have been given to the opposing party or his attorney.] (Ex. Sess. 1921, c. 92, s. 16; 1925, c. 282, s. 2.)

#### ART. 46. NOTICES

### § 918. Service by telephone or registered mail on witnesses and jurors.

Sheriffs, constables and other officers charged with service of such process may serve subpoenas and summonses for jurors by tele-

phone or by registered mail, and such service shall be valid and binding on the person served. When such process is served by telephone the return of the officer serving it shall state it is served by telephone. When served by registered mail a copy shall be mailed and a written receipt demanded and such receipt shall be filed with the return and be a necessary part thereof. (1915, c. 48; 1925, c. 98.)

**Editor's Note.**—The last sentence of this section providing for service by registered mail is new with the Acts 1925. The words "or by registered mail" in the third line are also new with the Act.

### § 921. Officer's return evidence of service.

**Prima Facie Only.**—In *Caviness v. Hunt*, 180 N. C. 384, 386, 104 S. E. 763, it was said:—"While this is one of the States in which the return on the process is not conclusive, even between the parties and privies to the action, still, under this section, and the authorities, such return is prima facie correct and cannot be set aside unless the evidence is 'clear and unequivocal.'"

**Service upon Infant.**—Where an infant is the owner of lands sought to be condemned by a municipality for cemetery purposes, such infant must defend by her general guardian, where one has been appointed (C. S., 451); and where service of process has been made upon the general guardian, and it appears upon the officer's return of notice that service has been executed upon the infant, such return is sufficient evidence of its service upon the infant to take the case to the jury upon the question involved in the issue. *Long v. Rockingham*, 187 N. C. 188, 121 S. E. 461.

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## CHAPTER 13

### CLERK OF SUPERIOR COURT

#### ART. 1. THE OFFICE

### § 927. Clerk's bond.

**Liability of Surety.**—Where a defaulting clerk of the Superior Court succeeds himself in office, and has given the required bond separately for each term, with the same surety, and continues his defalcation, recovery cannot be had against the surety except to the amount of the bond given for each term. *State v. Martin*, 188 N. C. 119, 123 S. E. 631.

The surety bond of a clerk of the Superior Court is fixed as to amount in the sum of five thousand dollars, and to that extent a surety is responsible for the defalcation of his principal, including 6 per cent interest from the time of notice given it except from judgment thereon, when a different principal applies and the surety is liable for 6 per cent interest on the judgment until it is paid. *State v. Martin*, 188 N. C. 119, 123 S. E. 631.

### § 929. Local modifications as to clerk's bond.

The bonds of the clerks of the superior court of Carteret, [Jones] and Pamlico counties may be fixed at an amount not less than five thousand dollars, in the discretion of the county commissioners.

The clerk of the superior court of Currituck County shall not be required to give bond in a larger penalty than the sum of five thousand dollars, unless the money or funds coming into his hands by order of the court or otherwise, by virtue of his office as clerk, at any time exceed in the aggregate one-half the penalty of his bond.



In that case he shall, within twenty days, file with the clerk of the board of commissioners a good and sufficient bond duly executed and justified as required by law, of like condition as already prescribed, and in a penalty double the amount of said funds, though not exceeding ten thousand dollars. This shall not be construed to modify or repeal any provisions of law whereby the county commissioners are authorized at any time to require said clerk to justify or renew his bond whenever necessary. [The bond of the clerk of Superior Court of Mecklenburg County shall be in an amount to be named by the board of commissioners of said county in its discretion, such an amount to be not less than ten thousand dollars (\$10,000) and not more than sixty thousand dollars (\$60,000): *Provided, however*, that the premiums upon the amount of said bond in excess of fifteen thousand dollars (\$15,000) shall be paid by Mecklenburg County.] (Rev., s. 295; 1907, c. 103; 1907, c. 990; 1925, c. 6, 184.)

See notes to § 927.

## ART. 2. DEPUTIES

### § 935. Appointment.

**Woman As Deputy.**—A woman is qualified to act as a notary public since the adoption of the amendment to the Constitution of this State, Art. VII, sec. 7; and also to pass upon the proper probate or a deed of lands, and make a valid certificate for its registration, when thereto deputized by the clerk of the Superior Court under the provisions of this section and section 3305. *Preston v. Roberts*, 183 N. C. 62, 110 S. E. 586.

## ART. 5. MONEY IN HAND

### § 962. Payment of money for indigent children.

When any moneys, in the amount of one hundred dollars or less, [per child], are paid into court for indigent or needy children for whom no one will become guardian, upon satisfactory proof of the necessities of such children the clerk may, upon his own motion or order, pay out the same in such sum or sums at such time or times as in his judgment is for the best interests of said children, to the mother or other person who has charge of said children, or to some discreet and solvent neighbor of said minor, to be used and faithfully applied by them for the sole benefit and maintenance of such indigent and needy children. The clerk shall take a receipt from the person to whom any such sum is paid, and may require such person to render an account of the expenditure of the sum or sums so paid, and shall record the receipt and the accounts, if any are rendered by order of the clerk, in a book entitled Record of Amounts Paid for Indigent Children, and such receipt shall be a valid acquittance for the clerk. That in all cases where a minor child is now or may hereafter be the beneficiary of any policy of life insurance and the sum due to said minor child by virtue of any such policy does not exceed three hundred dollars, the insurance company which issued said policy may pay the sum due thereunder to the clerk of the Su-

perior court of the county where said minor child resides, whose duty it shall be to receive it, and said clerk shall issue and deliver to such insurance company his receipt for the sum so paid, which shall be a complete release and discharge of said company from any and all liability to said minor child under and by virtue of any such policy of insurance. Moneys so paid to said clerk shall be held and disbursed in the manner and subject to the limitations now provided by law. (Rev., s. 924; 1899, c. 82; 1911, c. 29, s. 1; 1919, c. 91; 1924, c. 1, s. 1.)

### § 962 (a). Construction of preceding section.

The preceding section shall be construed, and shall have the effect of making section nine hundred and sixty-two, Consolidated Statutes, apply to all funds contemplated by it which are now or may come into the hands of the clerk of the Superior Court when the amount thereof does not exceed one hundred dollars (\$100) for each child who may be entitled to share therein. (1924, ch. 1.)

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## CHAPTER 15

### COMMON LAW

#### § 970. Common law declared to be in force.

**Section 8082 Part of Same Act.**—This section declaring the common law to be in force, first enacted in North Carolina in 1715, re-enacted in 1778, and successively with each complete re-enactment of our statute law, and finally in 1919, must be construed as a part of the same act as C S. sec. 8028. *Price v. Slagle* (N. C.) 128 S. E. 161, 166.

**Measure of Damages from Artesian Wells — English Common Law Not Applicable.**—The owner of lands is only entitled to the reasonable use of percolating waters collected in subterranean channels on his own lands; and where a city has dug artesian wells for the water supply of its inhabitants, so as to practically exhaust the supply to the artesian wells of an adjoining owner, to the injury of the productiveness of his lands and the health of his tenants, it is responsible in damages to the plaintiff for the injury to his lands thereby caused; and the English common-law doctrine to the contrary is inapplicable under this section. *Rouse v. Kinston*, 188 N. C. 1, 123 S. E. 482.

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## CHAPTER 16

### CONSTABLES

#### § 975. Vacancies in office.

Upon the death, failure to qualify or removal of any constable out of the township in which he was elected or appointed constable, [or upon the failure of the voters of a township to elect a constable as required in section nine hundred and seventy-one of the consolidated Statutes; but this clause shall not apply to Washington county] the board of commissioners may appoint another person to fill the vacancy, who shall be qualified and act until the next election of constables. (Rev., s. 936; Code, s. 646; R. C., c. 24, s. 6; 1925, c. 206.)



## CHAPTER 17

## CONTEMPT

**§ 978. Contempts enumerated; common law repealed.**

See notes to § 981.

**In General.** — The power to punish for either direct or indirect contempt is inherent in the court as necessary to its exercise of its other powers, and is a part of the fundamental law which the Legislature can neither create nor destroy. *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621.

Contempt of court is not only a willful disregard or disobedience of its orders, but such conduct as tends to bring the authority of the court and the administration of the law into disrepute, or to defeat, impair, or prejudice the rights of witnesses or parties to pending litigation. *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621.

Contempt of court is classified at common law as direct contempt, or words spoken or acts done in the presence of the court tending to defeat or impair the administration of justice, and consequential or indirect or constructive contempt, having a like tendency, done at a distance, and not in the presence of the court, and is preserved with its distinction by this section and section 985, in the former of which the offender may be instantly apprehended and dealt with, and in the latter by a rule issued based upon affidavit requiring the suspected party to show cause why he should not be attached; and in either instance the guilty person may be suitably punished. *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621.

**Disobeying Order of Clerk.** — Where in supplementary proceedings the defendant has willfully disobeyed an order of the clerk of the Superior Court having jurisdiction, in disposing of his property, he is in contempt of court under the provisions of this section and section 981. *Bank v. Chamlee*, 188 N. C. 417, 124 S. E. 741.

**§ 979. Appeal from judgment of guilty.**

**Contempt out of Presence of Court.**—An adjudication of contempt of court not committed within the immediate presence or verge of the court is appealable. *Bank v. Chamblee*, 188 N. C. 417, 124 S. E. 741.

**§ 981. Punishment.**

**Conduct Constituting Direct Contempt.**—While engaged in the trial of causes before him the mayor of a town, with jurisdiction of a justice of the peace, went just without the door of his office for a moment or two, and while there was insulted and vilely abused and threatened with attempted assault by the petitioner in habeas corpus proceedings for having had a warrant issued for the petitioner's son under a criminal charge. It was held that such acts and conduct of the petitioner constitute a direct contempt, authorizing punishment by imprisonment not to exceed thirty days or a fine not to exceed \$250, or both, in the discretion of the court. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

**§ 983. Courts and officers empowered to punish.**

**Power of Justice.**—The constitutional restriction imposed by the constitution on the jurisdiction of justices of the peace to fines of \$50 and imprisonment for thirty days, Article IV, sec. 27, apply only to the administration of the law in the trial of criminal cases, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business and maintain a proper respect for their authority, and in this interpretation weight is given to a like interpretation of our statute giving such courts power to punish by imprisonment not exceeding

thirty days or a fine not exceeding \$250, or both, in the discretion of the court, it being the same given to the judges of the Superior Courts, and other courts of record, for like offenses. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

### § 984. Indirect contempt; order to show cause.

See notes to section immediately following.

### § 985. Acts punishable as for contempt.

See note to § 981.

**In General.**—Contempt of court is classified at common law as direct contempt, or words spoken or acts done in the presence of the court tending to defeat or impair the administration or justice, and consequential or indirect or constructive contempt, having a like tendency, done at a distance, and not in the presence of the court, and is preserved with its distinction by our statute, C. S., 978, and this section, in the former of which the offender may be instantly apprehended and dealt with, and in the latter by a rule issued based upon affidavit requiring the suspected party to show cause why he should not be attached; and in either instance the guilty person may be suitably punished. *Snow v. Hawkes*, 183 N. C. 365, 111 S. E. 621.

**Putting Juror in Fear.**—Upon appeal to the Supreme Court from an adjudication of guilty in proceedings "as for contempt," under this section evidence that the appellant had approached a juror on the streets, not in the immediate presence of the court, after the jury in the case had been discharged but during the term, and had abused the juror and the others who had rendered a verdict against him, cursing them, and using threatening gestures to the juror, and putting him in fear, is sufficient to sustain the findings of the trial judge that such conduct tended to impede and hinder the proceedings of the court and impair the respect due thereto and the authority thereof, and the conviction based thereon. *In re Fountain*, 182 N. C. 49, 108 S. E. 342.

Where, in proceedings as for contempt of court, there is relevant and pertinent evidence that the respondent had put a juror in fear by his acts and conduct, it is sufficient on appeal to sustain a finding of assault by the Superior Court judge. *In re Fountain*, 182 N. C. 49, 108 S. E. 342.

**Intention Immaterial.**—Where the conduct of the respondent, proven or admitted, is in itself a contempt of court, he may not purge himself of the contempt, by denying his intention to show it. *In re Fountain*, 182 N. C. 49, 108 S. E. 342.

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## CHAPTER 18

### CONTRACTS REQUIRING WRITING

### § 987. Contracts charging representative personally; promise to answer for debt of another.

A telegram sent in good faith at the request of a debtor to his creditor that the former is reliable and that "any justifiable claims will be taken care of promptly," is insufficient to establish a contract of guaranty, or a promise to answer for debt, default or miscarriage of another, there being no promise to pay the debt if the debtor should not do so, but only an expression of opinion as to his responsibility concerning it. *Fain Grocery Co. v. Early, etc., Co.*, 181 N. C. 459, 107 S. E. 497.

**Consideration.**—The promise to answer for the debt of another as stated in this section, if made after the credit has been given, without



new consideration, is nudum pactum, and unenforceable; but if made before, it is founded upon the consideration existing between the principal parties; and where the promise is to pay out of the debtor's funds in the possession of the promisor, or is in the nature of his original obligation, the statute has no application. *Hickory Novelty Co. v Andrews*, 188 N. C. 59, 123 S. E. 314.

**Same—Landlord Assuming Debts of Tenant.**—It does not require a writing within the statute of frauds to answer for the debt, default, or miscarriage of another under this section, where the promisor directly assumes the debt or has a pecuniary interest therein; and where a landlord has obtained supplies to be furnished to his tenant within the coming crop year, upon his promise to see that the tenant pay for them, it is sufficient to deny the promisor's motion to nonsuit in an action against him by the furnisher of the supplies to recover for their payment. *Taylor v. Lee*, 187 N. C. 393, 121 S. E. 659.

**How Intent of Promisor Shown.**—Where the promise to pay the debt of another is sufficient under the statute, as to a continuing credit to be extended to the principal debtor, the intent of the promisor to become so bound may be shown by the surrounding circumstances and other transactions or written communications between the creditor and the promisor; and held, under the evidence of this case, it was reversible error for the trial judge to grant defendant's motion as of nonsuit. *Hickory Novelty Co. v. Andrews*, 188 N. C. 59, 123 S. E. 314.

**Agreement to Prevent Sale of Land.**—An agreement in consideration of the extension of an option that defendant will pay certain mortgage note owed by plaintiff or otherwise prevent the sale of the land, is not a promise to answer for the debt, etc., of another within this section. *Whedbee v. Ruffin*, 189 N. C. 257, 126 S. E. 616.

**Grantee's Agreement to Pay Mortgage.**—A purchaser of land received his deed thereof and gave back a mortgage, which was registered, for the balance of the purchase price secured by his notes under seal, and thereafter conveyed his quality to a third person in consideration of a certain cash payment and his grantee's parol promise to pay off the mortgaged debt: It was held that the parol agreement for the payment of the mortgage debt was not a promise to pay the debt of another required by this section to be in writing and is valid and enforceable as a direct obligation of his grantee supported by a sufficient consideration. *Parlier v. Miller*, 186 N. C. 501, 119 S. E. 898.

**Where the landlord receives of his tenant cotton** the latter has raised on the lands, under the parol promise to store it until the price should go higher, and to pay his debts, and has also later promised a creditor to pay his tenant's debt to him, the promise so made is not one to pay the debts of another, but is a direct obligation of the landlord to pay the debt, founded upon a sufficient consideration, that he would pay it out of the proceeds of the sale of the cotton placed by his tenant in his hands, and does not fall within the provisions of this section requiring the agreement to be in writing and signed by the party to be charged. *Hasty Mercantile Co. v. Bryant*, 186 N. C. 551, 120 S. E. 200.

**Contracts of Guaranty.**—This section requiring a writing signed, etc., by the party to be charged to make him legally responsible for the debt of another, applies to contracts of guaranty. *Hickory Novelty Co. v. Andrews*, 188 N. C. 59, 123 S. E. 314.

## § 988. Contracts for sale of land; leases.

See note to § 457, and to the section immediately preceding.

**Vendor Bound Only by Writing.**—The party to be charged in this suit for specific performance of a contract to convey lands, under the Statute of Frauds, this section, is the vendor therein, and the vendee, the plaintiff in the action, does not fulfill the duty imposed on him to

show that the statute has been complied with by a writing by which he alone is bound. *Clegg v. Bishop*, 188 N. C. 564, 125 S. E. 122.

**Enforcing Parol Contract.**—"A parol contract to sell or convey land may be enforced, unless the party to be charged takes advantage of the statute, by pleading the same. But a denial of the contract, as alleged, is equivalent to a plea of the statute. *McCall v. Textile Industrial Inst. (N. C.)*, 128 S. E. 349, 353.

**Sufficiency of Memorandum.**—To enforce a contract to convey land against the bargainee who is the party to be charged under the provisions of this section it is required that the written memorandum or contract shall be so reasonably certain or definite in its terms that the substance and essential elements may be understood from the written agreement itself, unaided by recourse to parol evidence. *Keith v. Bailey*, 185 N. C. 262, 116 S. E. 729.

The written memorandum required by this section for the conveyance of lands need not necessarily be made at the time of the agreement, and when reduced to writing thereafter, and otherwise sufficient, it will be valid. *McCall v. Lee*, 182 N. C. 114, 108 S. E. 390.

**Same—Verified Petition.**—Where the mother has contracted and agreed with her children to add her separate property to that of her deceased husband and divide it among them, reserving a life estate, and one of them being a minor son, she has proceeded before the court upon verified petition reciting the facts, for the conveyance of such minor's property, the recitation in her petition of the agreement is a sufficient memorandum under this section, and her contract in respect to all of the children is valid and enforceable under the statute. *McCall v. Lee*, 182 N. C. 114, 108 S. E. 390.

**Same—What Constitutes "Signing."**—The memorandum in writing required by the statute must be signed by the party to be charged, or by some other person by him thereto lawfully authorized. It is not sufficient that the other person, who, it is alleged, signed his name upon the memorandum, was lawfully authorized to do so by the party to be charged. The signing of a paper, writing or instrument is the affixing of one's name thereto, with the purpose or intent to identify the paper or instrument, or to give it effect as one's act. *McCall v. Textile Industrial Inst. (N. C.)*, 128 S. E. 349, 353.

**Same—On Appeal.**—The appellant must show error on appeal; and where he relies upon the insufficiency of letters from the grantor of lands to meet the requirements of the statute of frauds, this section, the contents of these letters must be made by him to appear in the record on appeal; and the fact that he noted on his case served that the Superior Court clerk, "here copy" the letters, does not legally excuse their omission. *Layton v. Godwin*, 186 N. C. 312, 119 S. E. 495.

**Memorandum Inconsistent With Contract.**—The owner of land entered into a contract with plaintiff to convey to him certain lands, sufficient under the statute of frauds, this section, and plaintiff gave to defendant a paper-writing agreeing to convey the lands, which was silent as to time, terms of payment, etc. The contract to which the plaintiff testified on the trial was partly in parol and did not correspond with the written memorandum, but was inconsistent with its term. It was held, that the memorandum not being the contract between the parties, the plaintiff was not entitled to recover. *Keith v. Bailey*, 185 N. C. 262, 116 S. E. 729.

**Contract Relating Only to Profits from Land.**—A contract between the plaintiff and defendant that certain land was to be bid in at a sale, paid for by the defendant, and resold in lots for a division of profits, is not such an interest in the lands that will require a writing, etc., under this section, but relates only to the profits upon the lands, and may be enforced as a valid agreement by parol. *Newby v. Atlantic Coast Realty Co.*, 182 N. C. 34, 108 S. E. 323.



The English statute of frauds, requiring a written contract to establish a trust in lands, was never adopted in this State, and a parol agreement that one of the parties should pay for certain lands, to be bid in at a sale, and held for a resale and a division of the profits between both of the parties, is valid, and is enforceable where one of them has accordingly bid in the land, but has taken title to himself. *Newby v. Atlantic Coast Realty Co.*, 182 N. C. 34, 108 S. E. 323.

This section, applies to those cases alone in which, as a result of sale, exchange or some other form of bargaining, a conveyance of land is contemplated from one of the contracting parties to the other; and not to contracting whereby two persons agree to purchase lands, whether generally or as a single venture, for the purpose of reselling it for the division of the profits. *Newby v. Atlantic Coast Realty Co.*, 182 N. C. 34, 108 S. E. 323.

**Same—Remedies for Breach.**—Where a defendant, without plaintiff's knowledge, has breached his valid parol agreement to purchase land for the use and benefit of the plaintiff and himself, to be afterwards sold for a division of the profits, and has taken title to himself alone, and has associated other and innocent purchasers to forestall the plaintiff in the enforcement of the trust, the plaintiff may assert his right to recover damages for a breach of the trust or contract, or in equity to follow any fund received by the defendant for the land. *Newby v. Atlantic Coast Realty Co.*, 182 N. C. 34, 108 S. E. 323.

Where the defendant has breached his valid parol agreement for the purchase of land and a division of the profits upon a resale, and has associated others with him, the plaintiff may elect to sue for specific performance, making the new associates parties, if they were not bona fide purchasers for value, without notice, and if they were, so that he cannot compel performance by them, he may recover damages for a breach of the contract, or a violation of the trust. *Newby v. Atlantic Coast Realty Co.*, 182 N. C. 34, 108 S. E. 323.

**Parol Trusts.**—A parol trust cannot be established between the parties in favor of the grantor in a deed conveying an absolute fee-simple title to lands, nor can such deed be converted into a mortgage without allegation and proof that a clause of defeasance or redemption was omitted therefrom by reason of ignorance, mistake, fraud, or undue influence. *Chilton v. Smith*, 180 N. C. 472, 105 S. E. 1.

In *Chilton v. Smith*, 180 N. C. 472, 474, 105 S. E. 1, it was said:—"To permit the terms of a solemn conveyance, absolute on its face, to be contradicted by a contemporaneous parol agreement would be in the teeth of the letter and the intent of the statute of frauds."

**Same—Lease—Agreements to Lease.**—A parol lease of lands for more than three years after the date of making the agreement is void under the Statute of Frauds, and our own statute, this section, and not from the time it goes into effect; and a parol agreement of lease to commence in futuro for the full three year period makes the tenant in possession a tenant at will, the rental price being that agreed upon in the parol lease. *Mauney v. Norvell*, 179 N. C. 628, 103 S. E. 372.

**A restriction on the use of land**, being in effect a negative easement, is an interest in land within this section. *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697.

**Description of Land.**—A written contract to convey the grantor's "entire tract or boundary of land, consisting of 146 acres," sufficiently describes the lands intended to be conveyed to admit of parol evidence tending to show that the owner had only one tract of land of that description in that locality, which was generally known, and upon which he resided, and which he cultivated, to designate the subject-matter of the contract and fit it to the description contained in the instrument, and the contract is sufficient to enforce specific performance by the seller under the statute of frauds. *Norton v. Smith*, 179 N. C. 553, 103 S. E. 14.

**Same—In Will.**—The description of land contained in a will which is sufficiently definite to admit of parol evidence to fit thereto the land intended to be conveyed, is also sufficient, in a deed or other written contract; and where there is a description therein of the lands intended to be conveyed, as a certain tract containing a certain acreage, it will not be presumed that the grantor or deviser had more than one tract of that description, and there is no patent ambiguity in the written instrument; and if it is shown that he did have more than one, it is an instance of latent ambiguity, which may be explained by parol evidence to identify the tract intended to be described. *Norton v. Smith*, 179 N. C. 553, 103 S. E. 14. This case distinguishes between patent and latent ambiguities, and contains excellent illustrations. Ed. Note.

**The plaintiff and another entered into a written contract** of purchase of defendant's land, sufficient to bind the latter under this section, and the plaintiff alone brought this action, alleging fraud, and seeks to recover back the part payment of the purchase price made thereon by himself and the other person interested, who has not been made a party: Held, by his action the plaintiff repudiated the contract and renounced his right to specific performance, and such other person having an equitable interest in the subject of the action is a proper party was a right to assert such equity and to have the entire controversy settled in one action. *Kendall v. Pinnix Realty Co.*, 183 N. C. 425, 111 S. E. 705.

**A contract made between a mortgagor and mortgagee** after the making of the mortgage on lands, which are intended to terminate that relationship as between themselves, does not fall within the intent and meaning of the statute of frauds (this section), requiring contracts concerning land, etc., to be put in writing, etc.; and where the mortgage has agreed by parol to release certain lands embraced in the description of the mortgage to a purchaser thereof from the mortgagor and take a mortgage in lieu thereof on other lands, it is enforceable. *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210.

Where there is an existing mortgage upon lands, and a purchaser of a part of the lands from the mortgagor, a parol agreement taken with the mortgagee, later made, that the latter would release the lands from the terms of the mortgage upon receiving in lieu of his lien a mortgage upon other lands, creates an equitable estoppel against the mortgagee's position that the parol agreement was ineffectual under the statute of frauds. *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210.

## CHAPTER 19

### CONVEYANCES

#### ART. 1. CONSTRUCTION AND SUFFICIENCY

#### § 991. Fee presumed, though word "heirs" omitted.

**"Heirs" Not Necessary.**—While prior to 1879 the word "heirs" was generally necessary to create a fee simple estate, there is exception as to devises and equitable estates, and these may pass without the word "heirs" if such intention appears by correct interpretation of the instrument. *Whichard v. Whitehurst*, 181 N. C. 79, 106 S. E. 463.

In *Seawell v. Hall*, 185 N. C. 80, 83, 116 S. E. 189, it was said:—"As we have said, the habendum indicates a fee simple; if the words 'by his mother,' or even the phrase 'and his heirs by his mother,' had been omitted, the premises also would have conveyed a fee."

**A conveyance in trusts**, made before 1879, which purports to convey the whole estate and interest of the grantor in lands in trust to the cestui que trusts, is of the fee simple title, though there are no words of inheri-



tance associated with the beneficiaries. *Hollowell v. Manley*, 179 N. C. 262, 102 S. E. 386.

**Correction of Instrument.**—The court, in its equitable jurisdiction, may correct an instrument so as to pass a fee in land when the intent so appears, in the submission of a case agreed. *Wichard v. Whitehurst*, 181 N. C. 79, 106 S. E. 463.

**Retention of Mineral Rights.**—Under this section where a deed conveys land "with the exception of one half of all the mineral found upon the premises, which is hereby expressly reserved," the grantor retains the fee in one half the mineral rights. *Central Bank, etc., Co. v. Wyatt*, 189 N. C. 107, 126 S. E. 93.

## § 992. Vagueness of description not to invalidate.

**Admission of Parol Evidence.**—A description of land in a deed, all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain state grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. *Buckhorn Land, etc., Co. v. Yarbrough*, 179 N. C. 335, 102 S. E. 630.

For an example of a description held sufficient to be located by parol evidence, see *In re Freeman's Hiers* (N. C.), 128 S. E. 404.

## § 996. Revocation of deeds of future interests made to persons not in esse.

**Deeds Prior to 1893.**—The provisions of the statute, ch. 498, Laws of 1893, from which this section is derived, making revocable by the grantor his deed to persons not then in being, has no application when the deed was made prior thereto, for the rights conferred thereunder are fixed at the date of its registration. *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 680.

### ART. 2. CONVEYANCES BY HUSBAND AND WIFE

## § 997. Instruments affecting married woman's title; husband to execute; privy examination.

**Failure to Have Privy Examination.**—Where a conveyance of land is made under a power of attorney sufficient in form by the heirs at law of deceased owner of land, as tenants in common, but one of them, a feme covert, at the time, had not had her privy examination taken under the provisions of this section, both the power of the attorney and the deed predicated and dependent upon it are ineffective to convey her interest, and she holds as a tenant in common with the purchaser, or those who may have acquired title under his deed. *Adderholt v. Lowman*, 179 N. C. 547, 103 S. E. 1.

**Acknowledgment Taken Over Phone.**—This section, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and the privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by sections 3323 and 3324, as to acknowledgments of grantors and married women; and such acknowledgment taken of the wife over a telephone does not meet the statutory requirements, and renders the conveyance invalid as to her. *Southern State Bank v. Summer*, 187 N. C. 762, 122 S. E. 848.

## § 1001. Innocent purchaser not affected by fraud in treaty, if privy examination regular.

**Instance—Innocent Mortgagee.**—Where a married woman has signed a mortgage or deed of trust to secure borrowed money, she may not

have it set aside upon allegation of fraud of probate officer in taking her separate examination, when she admits that the examination was taken in substance of the requirement of the statute and she had signed the conveyance, and there is no evidence that the mortgagee participated in the fraud. *Whitaker v. Sikes Co.*, 187 N. C. 613, 122 S. E. 468.

In *Whitaker v. Sikes Co.*, 187 N. C. 613, 615, 122 S. E. 468, the court said:—"Even if the justice practiced a fraud upon her, since she does not allege that the Sikes Company, the party to whom the instrument was made, had any knowledge thereof or participated in any way in the alleged fraud, she is precluded now from having it adjudged invalid and set aside."

### ART. 3. FRAUDULENT CONVEYANCES

#### § 1013. Sales in bulk presumed fraudulent.

**In General.**—This section regulating the sale of merchandise in bulk, with certain requirements as to notice to creditors, inventories, etc., making such sales, contrary to the provisions of the statute, prima facie evidence of fraud and void as against creditors of the seller, is a valid exercise of the police powers of government, and such sale is to be regarded as prima facie fraudulent in the trial of an issue as to its validity. *Raleigh Tire, etc., Co. v. Morris*, 181 N. C. 184, 106 S. E. 562.

**Liability of Purchasers.**—Where the dealer in automobile supplies; has sold his stock of merchandise in bulk to those whose business it is to use such material in making repairs for their customers, the latter may not avoid liability to the creditors of the vendor on the ground that they were not dealers in such wares under the doctrine announced in *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8, for the sale of the original creditor is itself void for non-compliance with this section. *Raleigh Tire etc., Co. v. Morris*, 181 N. C. 184, 106 S. E. 562.

**Subsequent Creditors Not Included.**—This section applies only as to creditors of the seller at the time of the sale and not to a subsequent creditor: certainly where there are no creditors at the time of the sale. *Farmer's Bank, etc., Co. v. Murphy*, 189 N. C. 479, 127 S. E. 527.

**Notice of Defective Title.**—The sale of merchandise in bulk is without the usual course of business, and affects the purchaser with notice of a defective title for noncompliance with this section, as long as it can be identified and traced to any one to whom it has been transferred otherwise than in good faith and for a valuable consideration. *Raleigh Tire, etc., Co. v. Morris*, 181 N. C. 184, 106 S. E. 562.

**Remedy of Creditors.**—When a sale of merchandise in bulk is avoided for noncompliance with this section the goods can be made available by direct process or levy and sale in the hands of the original purchaser, or such purchaser may be held liable for their value when they are disposed of by him, and either remedy is available to the creditors of the vendor against subsequent purchaser as long as the goods can be identified, or until they have passed into the hands of a bona fide purchaser for value without notice. *Raleigh Tire, etc., Co. v. Morris*, 181 N. C. 184, 106 S. E. 562.

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## CHAPTER 20

### CORONERS

#### § 1014. Election; appointment by clerk in special cases.

In each county a coroner shall be elected by the qualified voters thereof in the same manner and at the same time of the election of



members of the General Assembly, and shall hold office for a term of two years, or until his successor is elected and qualified. When there is no coroner in the county, or in the case of a vacancy in the office of coroner occurring for any reason, the clerk of the Superior Court for the county shall appoint the coroner, who shall, upon qualification, hold office until his successor is elected and qualified. (Rev., s. 1047; Const. Art. IV, s. 24; Extra Sess. 1924, c. 65.)

**Editor's Note.**—The provision in this section that the coroner shall hold office "until his successor is elected and qualified" is new with the Acts of 1924. The provision for filling vacancies "occurring for any reason" is also new. The old section provided only for appointment by clerk for special cases while since the Acts of 1924 the clerk appoints a coroner to fill the vacancy "until his successor is elected and qualified."

### **§ 1015. Oaths to be taken.**

Every coroner, before entering upon the duties of his office, shall take and subscribe to the oaths prescribed for public officers, and an oath of office. (Rev., s. 1048, Code, s. 1661; Extra Sess. 1924, c. 65.)

**Editor's Note.**—This section was not changed by Acts 1924.

### **§ 1016. Coroner's bond.**

Every coroner shall execute an undertaking conditioned upon the faithful discharge of the duties of his office with good and sufficient surety in the penal sum of two thousand dollars (\$2,000), payable to the State of North Carolina, and approved by the board of county commissioners. (Rev., s. 299; Code, s. 661; R. C., c. 25, s. 2; 1791, c. 342, ss. 1, 2; 1920, c. 1047, s. 562; 1889, c. 54, s. 52; 1924, c. 65.)

**Editor's Note.**—The words "and sufficient" in the second line and "penal sum" in the third line of this section are new with the Acts of 1924.

### **§ 1017. Coroners' bonds registered; certified copies evidence.**

All official bonds of coroners shall be duly approved, certified, registered, and filed as sheriffs' bonds are required to be; and certified copies of the same duly certified by the register of deeds, with official seal attached, shall be received and read in evidence in the like cases and in like manner as such copies of sheriffs' bonds are now allowed to be read in evidence. (Rev., s. 200; Code, s. 662; 1860-1, c. 18; 1924, c. 65.)

**Editor's Note.**—The Acts of 1924 substituted in this section the words "certified by the register of deeds, with official seal attached" in lieu of "from the register's office."

### **§ 1018. In case of vacancy, clerk appoints special.**

Whenever there is a vacancy existing in the office of coroner in any county, and it is made to appear to the clerk of the Superior Court of such county by satisfactory evidence that a deceased person whose body has been found within the county probably came to his death by the criminal act or default of some person, it is the duty of the clerk of the Superior Court of such county to appoint some

suitable person as special coroner to hold an inquest over the body of the deceased. Such special coroner shall not be appointed, however, unless, in the opinion of the clerk, the coroner's investigation ought to be made before he has sufficient time to select a coroner to fill such a vacancy for the remainder of the term, and if it is practical for him to fill such vacancy for the remainder of the term in time for the investigation of the deceased, he shall do so; otherwise, he shall make a special appointment and shall fill the vacancy in the office of coroner for his county as soon as it is practical for him to do so, and not later than thirty days thereafter. (Rev., s. 1049; 103, c. 661; 1924, c. 65.)

**Editor's Note.**—In this section, the Acts of 1924 substituted the words "to the clerk of the Superior Court of such county by satisfactory evidence" for "by the affidavit of some responsible person." The latter half of this section is new with the same Act.

### **§ 1019. Powers, penalties, and liabilities of special coroner.**

The special coroner appointed under the provisions of the preceding section shall be invested with all the powers and duties conferred upon the several coroners in respect to holding inquests over deceased bodies, and shall be subject to the penalties and liabilities imposed on the said coroners. (Rev., 1050; 1903, c. 661, s. 2; 1924, c. 65.)

**Editor's Note.**—This section was not changed by the Act of 1924.

### **§ 1020. The duties of coroners with respect to inquests and preliminary hearings.**

The duties of the several coroners with respect to inquests and preliminary hearings shall be as follows:

1. Whenever it appears that the deceased probably came to his death by the criminal act or default of some person, he shall go to the place where the body of such deceased person is and make a careful investigation and inquiry as to when and by what means such deceased person came to his death and the name of the deceased, if to be found out, together with all the material circumstances attending his death, and shall make a complete record of such personal investigation: *Provided, however,* that the coroner shall not proceed to summon a jury as is hereinafter provided if he shall be satisfied from his personal investigation that the death of the said deceased was from natural causes, or that no person is blamable in any respect in connection with such death, and shall so find and make such finding in writing as a part of his report, giving the reason for such finding; unless an affidavit be filed with the coroner indicating blame in connection with the death of the deceased.

2. To summon forthwith a jury of six good and lawful men, freeholders, who are otherwise qualified to act as jurors, who shall not be related to the deceased by blood or marriage, or to any person suspected of guilt in connection with such death, and the coroner,



upon the oath of the jury at the said place, which oath may be taken by him or any other person authorized to administer oaths, shall make further inquiry as to when, how and by what means such deceased person came to his death, and shall cause to come before himself and the said jury all such persons as may be necessary in order to complete said inquiry.

3. If it appears that the deceased was slain, or came to his death in such manner as to indicate any person or persons guilty of the crime in connection with the said death, then the said inquiry shall ascertain who was guilty, either as principal or accessory, or otherwise, if known, or in any manner, the cause of his death.

4. Whenever in such investigations, whether preliminary or before his jury, it shall appear to the coroner or to the jury that any person or persons are culpable in the matter of such death, he shall forthwith issue his warrant for such person and cause the same to be brought before him and the inquiry shall proceed as in the case of preliminary hearings before justices of the peace, and in case it appears to the said coroner and the jury that such persons are probably guilty of any crime in connection with the death of the deceased, then the said coroner shall commit such person to jail, if it appears that such person is probably guilty of a capital crime, and in case it appears that such persons are not probably guilty of a capital crime, but are probably guilty of a lesser crime, then such coroner to have the power and authority to fix bail for such person or persons, all such persons as are found probably guilty in such hearing shall be delivered to the keeper of the common jail for such county by the sheriff or such other officer as may perform his duties at such hearings and committed to jail unless such persons have been allowed and given the bail fixed by such coroner.

5. As many persons as are found to be material witnesses in the matters involved in such inquiry and hearings and are not culpable themselves shall be bound in recognizance with sufficient surety to appear at the next Superior Court to give evidence, and such as may default in giving such recognizance may be by such coroner committed to jail as is provided for State witnesses in other cases.

6. To summon a physician or surgeon and to cause him to make such examination as may be necessary whenever it appears to such coroner as proper to have such examination made, or, upon request of his jury, or upon the request of the solicitor of his district or counsel for any accused or any member of the family of the deceased: *Provided, however,* that when the coroner shall himself be a physician or surgeon, he may make such examination himself.

7. Immediately upon information of the death of a person within his county under such circumstances as, in the opinion of the coroner, may make it necessary for him to investigate the same, to notify the solicitor of his district, and to make such additional investigation as he may be directed to do by such solicitor.

8. To permit counsel for the family of the deceased, the solicitor

of his district, or any one designated by him, and counsel for any accused person to be present and participate in such hearing and examine and cross-examine witnesses and, whenever a warrant shall have been issued for any accused person, such accused person shall be entitled to counsel and to a full and complete hearing.

9. To begin his inquiry with his jury where the body of the deceased shall be, said hearing may be adjourned to other times and places, and the body of the deceased need not be present at such further hearing.

10. To reduce to writing all of the testimony of all witnesses, and to have each witness to sign his testimony in the presence of the coroner, who shall attest the same, and, upon direction of the solicitor of the district, all of the testimony heard by the coroner and his jury shall be taken stenographically, and expense of such taking, when approved by the coroner and the solicitor of the district, shall be paid by the county. When the testimony is taken by a stenographer, the witness shall be caused to sign the same after it has been written out, and the coroner shall attest such signature. That the attestation of all the signatures of witnesses who shall testify before the coroner shall include attaching his seal, and such statements, when so signed and attested, shall be received as competent evidence in all courts either for the purpose of contradiction or corroboration of witnesses who make the same, under the same rules as other evidence to contradict or corroborate, may be now admitted. (Rev., 1051; Code, s. 657; 1899, c. 478; 1905, c. 628; 1909, c. 707, s. 1; 1924, c. 65.)

**Editor's Note.**—The procedure under the old section is retained by the Act of 1924, but the steps are set out in much greater detail. Subsections 7, 8, 9, and the portions of 10 referring to stenographic reports are new.

### **§ 1021. Acts as sheriff in certain cases; special coroner.**

If at any time there is no person properly qualified to act as sheriff in any county, the coroner of such county is hereby required to execute all process and in all other things to act as sheriff, until some person is appointed sheriff in said county; and he shall be under the same rules and regulations, and subject to the same forfeitures, fines, and penalties as sheriffs are by law for neglect or disobedience of the same duties. If at any time the sheriff of any county is interested in or a party to any proceeding in any court, and there is no coroner in such county, or if the coroner is interested in any such proceeding, then the clerk of the court from which such process issues shall appoint some suitable person to act as special coroner to execute such process, and such special coroner shall be under the same rules, regulations, and penalties as hereinabove provided for. (Rev., s. 1052; Code, s. 658; 1891, c. 173; 1924, c. 65.)

**Editor's Note.**—This section is not changed by the Act of 1924.

### **§ 1022. Compensation of jurors at inquest.**

All persons who may be summoned to act as jurors in any inquest



held by a coroner over dead bodies, and who, in obedience thereto, appear and act as such jurors, shall be entitled to the same compensation in per diem and mileage as is allowed by law to jurors acting in the Superior Courts. The coroners of the respective counties are authorized and empowered to take proof of the number of days of service of each juror so acting, and also of the number of miles traveled by such juror in going to and returning from such place of inquest, and shall file with the board of commissioners of the county a correct account of the same, which shall be, by such commissioners, audited and paid in the manner provided for the pay of jurors acting in the Superior Courts. (Rev., s. 1053; Code, ss. 659, 660; 1924, c. 65.)

**Editor's Note.**—This section is unchanged by the Act of 1924.

**§ 1022 (a). Hearing by coroner in lieu of other preliminary hearing; habeas corpus.**

All hearings by a coroner and his jury, as provided herein, when the accused has been arrested and has participated in such hearing, shall be in lieu of any other preliminary hearing before a justice of the peace or a recorder, and such cases shall be immediately sent to the clerk of the Superior Court of such county and docketed by him in the same manner as warrants from justices of the peace. Any accused person who shall be so committed by a coroner shall have the right, upon *habeas corpus*, to have a judge of the Superior Court review the action of the coroner in fixing bail or declining the same. (1924, c. 65.)

**§ 1022 (b). Service of process issued by coroner.**

All process, both subpoenas and warrants for the arrest of any person or persons, and orders for the summoning of a jury, in case it may appear necessary for such coroner to issue such order, shall be served by the sheriff or other lawful officer of the county in which such dead body is found, and in case it is necessary to subpoena witnesses or to arrest persons in a county other than such county in which the body of the deceased is found, then such coroner may issue his process to any other county in the State, with his official seal attached, and such process shall be served by the sheriff or other lawful officer of the county to which it is directed, but such process shall not be served outside of the county in which such dead body is found unless attested by the official seal of such coroner. (1924, c. 65.)

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## CHAPTER 21

### CORPORATION COMMISSION

#### ART. 1. ORGANIZATION

**§ 1023. Court of record.**

**Legislative Authority.**—The Legislature, either directly or through appropriate government agencies, has the power to establish reasonable

regulations for public service corporations in matters affecting the public interest; and where such corporations have devoted their property to the public use and are operating under a legislative charter and exercising the right of eminent domain therein conferred, they are, in a peculiar sense, subject to the police power of the State conferring it, to which, when properly exerted in reference to these companies, the proprietary rights of individual ownership must, to that extent, be subordinated to the public welfare. In re Southern Public Utilities Co., 179 N. C. 151, 101 S. E. 619.

**Parol Agreement As to Filing Exceptions.**—The Corporation Commission is a court of record under this section and it must appear thereon that a railroad company claiming an extension of time to file exceptions to the commissioner's order has done so, and no alleged parol agreement for an extension of time will be considered. *State v. Southern R. Co.*, 185 N. C. 435, 117 S. E. 563.

### ART. 3. POWERS AND DUTIES

#### § 1039. To authorize lumber companies to transport commodities.

**Establishing Joint Rate of Transportation.**—A lumber company, chartered and organized for the purpose of transporting its own products, may be created a limited public carrier by the order of the Corporation Commission, under the provisions of this section; and when it is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the commission may make a valid order establishing a joint rate of transportation in the same case between it and a connecting common carrier by rail to points beyond the initial road. *Corporation Comm. v. Atlantic, etc., R. Co.*, 187 N. C. 187 N. C. 424, 121 S. E. 767.

#### § 1041. To require change, repair, and additions to stations.

**Liberal Construction.**—This section and section 1042 are of a remedial nature, and will be liberally construed by the courts in favor of the exercise of the authority conferred. *State v. Southern R. Co.*, 185 N. C. 435, 117 S. E. 563.

#### § 1042. To provide for union depots.

See notes to § 1041.

#### § 1048. To regulate crossings and to require grade crossings.

**Authority of City.**—A city has both inherent and authority by general statute over its streets for the protection of its citizens, which is not taken from it by this section conferring like powers upon the Corporation Commission. *Durham v. Southern R. Co.*, 158 N. C. 240, 117 S. E. 17.

### ART. 4. RATE REGULATION

#### § 1066. Commission to fix rates for public utilities.

Subject to the provisions as to passenger rates in the chapter, Railroads, and as to railroad freight rates in this chapter, the commission shall make reasonable and just rates and charges, in intrastate traffic, and regulate the same, of and for—

1. Railroads, street railways, steamboats, canal and express com-



panies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

2. The transmission and delivery of messages by any telegraph company, and for the rental of telephone and furnishing telephonic communication by any telephone company or corporation.

3. Persons, companies and corporations, other than municipal corporations, engaged in furnishing electricity, electric light, current, power or gas, or owning or operating a public sewerage system in North Carolina.

4. The through transportation of freight, express or passengers.

5. The use of railway cars carrying freight or passengers.

6. And shall make rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

7. And shall make, require or approve what is known as "milling-in-transit" rates on grain; or lumber to be dressed or shipped over the line of the railroad company on which such freight originated, [and shall have authority to make, require and approve what is known as warehousing-in-transit rates on cotton].

8. And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the commission.

The powers vested in the commission by this section over the several subjects enumerated shall be the same as that vested in it in respect to railroads and other transportation companies. (Rev., ss. 1096, 1099; 1899, c. 164, ss. 2, 14; 1903, c. 683; 1907, c. 469, s. 4; 1913, c. 127, s. 2; 1917, c. 194; 1925, c. 37.)

As to rates for lumber companies, see notes to section 1039.

The word "traffic," used in this section to confer upon the Corporation Commission the authority to establish just and reasonable rates of charges by certain public-service corporations, includes the transportation and also the sale and distribution of the commodities affected. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

While the generation of electricity in another State when transported to purchasers in this State may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Corporation Commission to establish a just and reasonable rate of charges in conformity with the statutory powers, there being no interfering act of Congress relating to the subject. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

**Contracts Previously Made.**—The authority conferred upon the Corporation Commission to establish reasonable and just rates of charges by a public-service corporation for furnishing to its customers electrical power, come within the police powers of State, and contracts previously made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a

safe return upon its investment, having proper regard to the public interest that plants of this character should be properly run and maintained. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

**Nature of Rates.** — When the Corporation Commission has finally established, under the provisions of the statute, rates to be charged by a public-service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively, bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

**Rates of Street Railway.**—A corporation commission is created under the provisions of our statute giving it general supervision over railways, street railways, and like companies of the State, and empowering it to fix such rates, charges and tariffs as may be reasonable and just, having in view the value of the property, the cost of improvements and maintenance, the probable earning capacity under the proposed rates, the sum required to meet operating expenses, and other specific matters pertinent to such an inquiry, and these being police powers delegated to this commission, governmental so far as they extend, a public service street railway company, operating under a city charter, and under a contract with the city restricting the passenger fare authorized to be charged its patrons, may be authorized in conformity with the act, to raise its charges to its passengers, when in the opinion of the commission such is necessary for it to properly maintain its system, allowing a reasonable profit, to meet the requirements of the public for adequate, safe, and convenient service. In *re Southern Public Utilities Co.*, 179 N. C. 151, 101 S. E. 619.

A public service railway corporation operating in various localities may not by contract fix its passenger fares and thus prevent the corporation commission, under the authority conferred by statute, from determining what rates are, under the circumstances, just and reasonable, for such would authorize such companies to discriminate, unlawfully, among its patrons. In *re Southern Public Utilities Co.*, 179 N. C. 151, 101 S. E. 619.

**Right of Appeal.**—Under the provisions of our statute, Rev., 1054, et seq. (ch. 20), any party affected by the order of the corporation commission as to rates or charges for passengers by a street railway company, etc., is given the right of appeal to the courts from such order, and the rate of charges so fixed are to be considered just and reasonable charges for the services rendered, unless and until they shall be charged or modified on appeal, or the further action of the commission, itself, approving *State v. Seaboard Air Line R. Co.*, 173 N. C. 413, 92 S. E. 150. In *re Southern Public Utilities Co.*, 179 N. C. 151, 101 S. E. 619.

## § 1067. Rates established deemed just and reasonable.

**Burden of Proof.**—The rates or charges established by the Commission shall be deemed just and reasonable under this section. The burden was therefore upon appellant to offer evidence sufficient for the jury to find, upon appeal and under the instructions of the court, that the schedule of rates established by the Commission in this case were not just and reasonable to both petitioner and respondent. *Corporation Comm. v. Henderson Water Co.* (N. C.), 128 S. E. 465, 466.

**Rates Deemed Unjust.** — Including public-service corporations furnishing its customers electricity for power, etc., the Corporation Commission is authorized by statute to fix just and reasonable rates or charges, and when these rates are so fixed, other or lower rates are to be deemed as unjust and unreasonable. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

## § 1068. How maximum rates fixed.

**Tax Valuation as Basis.**—Under the provisions of this section, which is



valid, the Corporation Commission, in fixing a reasonable and just rate of charges for public-service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant. It was held that under the facts of the instant case, an exception was untenable that the rate fixed was upon the basis of the tax valuation alone. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

### § 1071. Revision of rates.

**Establishing Joint Rate of Transportation.**—A lumber company, chartered and organized for the purpose of transporting its own products, may be created a limited public carrier by the order of the Corporation Commission, under the provisions of C. S., 1039; and when it is of standard gauge and of sufficient equipment and extensiveness to affect the interest of the public, the Commission may make a valid order establishing a joint rate of transportation in the same cars between it and a connecting common carrier by rail to points beyond the initial road. *Corporation Comm. v. Atlantic Coast Line R. Co.*, 187 N. C. 424, 121 S. E. 767.

## ART. 6. POWERS IN RESPECT TO PROCEDURE

### § 1097. Right of appeal; how taken.

**In General.**—An appeal lies under the provision of this section, from an order of the Corporation Commission fixing certain rates to be charged by a public-service corporation to its customers for furnishing them with electrical power, to the Superior Court, where the trial will be de novo, with the presumption that the rates so fixed by the Corporation Commission are prima facie just and reasonable, and from thence only will a further appeal lie to the Supreme Court, governed by the rule that it must not be fragmentary, but that it shall be from a final judgment or one final in its nature. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

**Fragmentary Appeal.**—Where the customers of a public-service corporation are properly joined upon notice, and participate in the hearing before the Corporation Commission upon the question of whether the petitioning corporation should be allowed to raise its rates of charges for electrical power furnished them, on appeal to the Superior Court from the rates fixed by the commission as just and reasonable, the ruling as to the rates so fixed shall be regarded as single and entire, applying to all, and some of the users may not separate themselves from the others and appeal to the Supreme Court from an order overruling their exception for the lack of authority of the commission to make the rates, the appeal being fragmentary, and not from a final judgment or one in its nature final. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

**When Remedy by Exception.**—Where the ruling of the Superior Court does not amount to a final judgment, or one final in its nature, the remedy of the party adversely affected is by exception, preserving his right until such appeal may be had from a final judgment. *State v. Cannon Mfg. Co.*, 185 N. C. 17, 116 S. E. 178.

**Statutory Notice Mandatory.**—The statutory notice of an appeal by a railroad company from an order of the Corporation Commission is mandatory and cannot be extended by the consent of the parties of record. *State v. Railroad Co.*, 185 N. C. 435, 117 S. E. 563.

**Time for Excepting to Order.**—Where the corporation commission ordered the building of a union depot, a suspension of the order did not extend the time within which the railroads might except to such order. *State v. R. R. Co.*, 185 N. C. 435, 117 S. E. 563.

**Appeal from Proceedings to Raise Rates.**—It is the duty and assuming the right of a municipality granting its charter to a corporation to op-

erate a street car system therein (Rev., 2916, subsec. 6), and which, by contract, has limited the fares to be charged passengers within a certain amount, to represent the public in proceedings upon petition filed by the railway company before the corporation commission requesting that it be permitted to raise the fares beyond those limited in the contract, and the municipality may appeal through the courts as the statute prescribes, when the order is adverse to it or the interest it represents, as a "party affected by the decision and determination of the commission," expressly provided for by the statute. In re Southern Public Utilities Co., 179 N. C. 151, 101 S. E. 619.

### **§ 1103. Peremptory mandamus to enforce order, when no appeal.**

**When Order Regarded as Final Judgment.**—Where the Corporation Commission has ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads have lost or waived their statutory right to appeal, such order is regarded as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon failure of the railroads to except and appeal therefrom is the remedy authorized by the statute applicable. *State v. Railroad Co.*, 185 N. C. 435, 117 S. E. 563.

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## CHAPTER 22

### **CORPORATIONS**

#### ART. 1. DEFINITIONS

### **§ 1113. Definitions.**

See note to § 1705.

#### ART. 2. FORMATION

### **§ 1114. How created.**

Three or more persons who desire to engage in any business, or to form any company, society, or association, not unlawful, except railroads, other than street railways, or banking or insurance, or building and loan associations, may be incorporated in the following manner only (except corporations created for charitable, educational or reformatory purposes that are to be and remain under the patronage and control of the state): Such persons shall, by a certificate of incorporation, under their hands and seals, set forth—

1. The name of the corporation. No name can be assumed already in use by another domestic corporation, or so similar as to cause uncertainty or confusion, and the name adopted must end with the word "company," "corporation," or "incorporated."

2. The location of its principal office in the state.

3. The object or objects for which the corporation is to be formed.

4. The amount of the total authorized capital stock, the number of shares into which it is divided, the par value of each share, the amount of capital stock with which it will commence business, and, if there is more than one class of stock, a description of the different classes. The provisions of this subsection shall not apply to re-



ligious, charitable, [nonprofit social] or literary corporations, unless they desire to have a capital stock. If they desire to have no capital stock, that fact and the conditions of membership shall be stated.

5. The names and postoffice addresses of the subscribers for stock and the number of shares subscribed for by each; the aggregate of the subscriptions shall be the amount of capital with which the corporation will commence business. If there is to be no capital stock, the certificate must contain the names and postoffice addresses of the incorporators.

6. The period, if any, limited for the duration of the corporation.

7. The certificate of incorporation may also contain any provision, consistent with the laws of this state, for the regulation of the affairs of the corporation, or creating, defining, limiting and regulating its powers, directors and stockholders, or any class or classes of the latter. (Rev., s. 1137; Code, s. 677; 1885, cc. 19, 190; 1889, c. 170; 1891, c. 257; 1893, cc. 244, 318; 1897, c. 204; 1899, c. 618; 1901, c. 2, s. 8, cc. 6, 41, 47; 1903, c. 453; 1911, c. 213, s. 1; 1913, c. 5, s. 1; Const., Art. 8, s. 1; 1920, c. 55; 1924, c. 98.)

### ART. 3. POWERS AND RESTRICTIONS

#### § 1126. Express powers.

Every corporation has power—

1. To have succession, by its corporate name, for the period limited in its charter, and when the charter contains no time limit, for a period of sixty years.

2. To sue and be sued in any court.

3. To make, use, and alter a common seal.

4. To purchase, acquire by devise or bequest, hold and convey real and personal property in or out of the state, and to mortgage the same and its franchises.

5. To elect and appoint, in such manner as it determines to be proper, all necessary officers and agents, fix their compensation, and define their duties and obligations. And when there devolves upon an officer or agent of a corporation such duties and responsibilities that a financial loss would result to the corporation from the death and consequent loss of the services of such officer or agent, the corporation has an insurable interest in, and the power to insure the life of, the officer or agent for its benefit [and in all cases where a religious educational or charitable corporation or institution shall be or has been named as beneficiary in any policy of life insurance by a friend, student, former student or any person who for any reason is loyal to such corporation or institution and has himself or herself paid the premiums on said policy then such corporation or institution shall be deemed to have an insurable interest in the life of such person].

6. To conduct business in this state, other states, the District of Columbia, the territories, dependencies and colonies of the United

States, and in foreign countries, and have offices in or out of the state.

7. To make by-laws and regulations, consistent with its charter and the laws of the state, for its own government, and for the due and orderly conduct of its affairs and management of its property.

8. To wind up and dissolve itself, or be wound up and dissolved, in the manner hereafter mentioned. [To sell any part of or all of its corporate property, whenever such sale shall be authorized by a two-thirds vote of the board of directors of such corporation and approved by the vote of the holders of two-thirds of the stock entitled to vote at any stockholders' meeting, notice of which contains notice of the proposed sale: *Provided*, that any corporation hereafter organized may insert a provision in its charter that the powers granted by this subsection nine may be exercised only when such sale shall be approved by the holders of such amount of the stock of the corporation (not less than two-thirds of such stock entitled to vote) or such amount of each class of stock as may be specified in said charter; and *provided further*, that any corporation heretofore organized may by vote of the holders of two-thirds of the stock entitled to vote amend its charter at any stockholders' meeting, notice of which contains notice of the proposed amendment so as to provide the vote of stockholders (not less than two-thirds of the stock entitled to vote) required to enable the corporation to exercise the powers granted by this subsection nine: *Provided*, this act shall not be construed as authorizing the sale of stock in bulk, in violation of the bulk sales law: *Provided*, this act shall not be construed to limit or abridge the powers now given by law to any corporation.] (Rev., s. 1128; Code, ss. 663, 666, 691, 692, 693; 1893, c. 159; 1901, c. 2, s. 1; 1909, c. 507, s. 1; 1925, c. 235; 1925, c. 298.)

**Not Applicable to State Highway Commission.**—This section giving corporations the right to sue and be sued, does not apply to the State Highway Commission, a governmental agency of the State, but only to private and quasi-private corporations. *Carpenter v. Altantic, etc., Ry. Co.*, 184 N. C. 400, 114 S. E. 693.

**Corporate Seal.**—While it is required for the sufficiency of the deed of a corporation to convey its lands that the corporate seal should be affixed to the instrument, any device used for the corporate seal will be sufficient, provided it was intended for and used as the seal of the corporation, and had been adopted by proper action of the corporation for that purpose. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166. See notes of this case under sec. 3326.

**The simple word "seal"** with a scroll adopted as the seal of a corporation and used by it on a deed to its lands according to resolutions of the stockholders and directors thereof at separate meetings held for the purpose, when all were present, is sufficient. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166.

### § 1131. Amendments, generally.

A corporation, whether organized under a special act or general laws, and which might now be created under the provisions of this chapter, may, in the manner set out below—

1. Change the nature or relinquish one or more branches of its



business, or extend its business to such other branches as might have been inserted in its original certificate of incorporation.

2. Change its name.

3. Extend its corporate existence, but if such corporation possesses powers, franchises, privileges or immunities, which could not be obtained under this chapter, such extension does not continue, renew or extend any of the same, but they are waived and abandoned by the filing of the certificate of extension.

4. Increase or decrease its capital stock.

5. Change the par value of the shares of its capital stock.

6. Create one or more classes of preferred stock.

7. Make any other desired amendment. In all cases the certificate of amendment can obtain only such provisions as could be lawfully and properly inserted in an original certificate of incorporation filed at the time of making the amendment.

The board of directors shall pass a resolution declaring that the amendment is advisable, and call a meeting of the stockholders to take action thereon; the meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days notice, given personally or by mail; if [the holders of a majority of the shares of stock] two-thirds in interest of each class of the stockholders with voting powers vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary, under the corporate seal, acknowledged as in the case of deeds to real estate, and this certificate, together with the written assent, in person or by proxy, of said stockholders, shall be filed and recorded in the office of the secretary of state. Upon such filing the secretary of state shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, and thereupon the certificate of incorporation is amended accordingly. The certificate of the secretary of state, under his official seal, that such certificate of amendment and assent have been filed in his office, is evidence of the amendment in all courts and places. A corporation which cannot now be created under the provisions of this chapter may in like manner increase or decrease its capital stock, or change its name. [Any corporation hereafter organized may insert a provision in its charter that amendments to said charter may be made or amendments to said charter in certain specified respects may be made only when such amendments shall be approved by the holders of such amount of the stock of the corporation (not less than a majority of the shares of stock with voting powers) or such amount of each class of stock as may be specified in said charter and any corporation heretofore organized may by vote of the holders of a majority of the stock entitled to vote amend its charter at any stockholders' meeting, notice of which contains notice of the proposed amendment so as to provide the vote of stockholders (not less than a majority

of the stock entitled to vote) required to enable the corporation to amend its charter or to amend it in certain specified respects:

*“Provided, however, that no new class of stock shall hereafter be created by amendment of the charter or otherwise entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already outstanding except with the consent of the holders of record of two-thirds (or such greater amount as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers. Provided further that the portions of this section in brackets shall apply to all corporations other than banks and building and loan associations.”* (Rev., ss. 1175, 1178; 1893, c. 380; 1899, c. 618; 1901, c. 2, ss. 29, 30, 37; 1903, c. 516; 1925, c. 1118, ss. 1, 2a.)

### **§ 1132. Amendments by charitable, educational, penal or reformatory corporations.**

A charitable, educational, [social, ancestral, historical,] penal, or reformatory corporation not under the patronage or control of the state, [and any corporation, without capital stock organized for the purpose of aiding in any work of any church, religious society or organization, or fraternal order] whether organized under a special act or general laws, may change its name, extend its corporate existence, change the manner in which its directors, trustees or managers are elected or appointed, abolish its present method of electing such officers and create a different method of election, and generally reorganize the manner of conducting such corporation, and make any other amendment of its charter desired, in the following manner: The board of directors, trustees, or managers shall pass a resolution declaring that the amendment is advisable, and call a meeting of trustees, managers, and directors to take action thereon. The meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision, upon ten days' notice given personally or by mail. If two-thirds of the directors, trustees, or managers of the corporation vote in favor of the amendment, a certificate thereof shall be signed by the president and secretary under the corporate seal, acknowledged as provided in the case of deeds to real estate, and such certificate, together with the written assent in person or proxy of two-thirds of the directors, trustees, or managers, shall be filed and recorded in the office of the secretary of state, and upon filing it he shall issue a certified copy thereof, which shall be recorded in the office of the clerk of the superior court of the county in which the original certificate of incorporation is recorded, or in which the corporation is doing business, and thereupon the certificate of incorporation shall be deemed amended accordingly. Such certificate of amendment may contain only such provision as it would be lawful and proper to insert in an original certificate of incorporation made at the time of making the amendment, and the certificate of the secretary of state, under his official seal,



that such certificate and assent has been filed in his office shall be taken and accepted as evidence of such amendment in all courts. (1917, c. 62, s. 1; 1925, c. 42; 1925, c. 257.)

### § 1137. Resident process agent.

**Merger of Express Companies.** — An express company conveyed its property, used in transportation, for its appraised value, to the American Express Company formed at the suggestion of the Director General of Railways, etc., under Government control, retaining property of very large value, so that it remained perfectly solvent, and continued to do business under its franchise, and having its own officials and shareholders distinct from those of the new corporation. It was held that therein no such reorganization, reincorporation, merger, or element of fraud or trust as would make the American Express Company liable for the negligence, torts or obligations of the company, whose property it had thus acquired, nor is the case affected by the provisions of this section, requiring foreign corporations to keep a process agent in this state. *McAlister v. American Ry. Express Co.*, 179 N. C. 556, 103 S. E. 129.

## ART. 4. DIRECTORS AND OFFICERS

### § 1145. Officers, agents, and vacancies.

**Implied Authority of Secretary.** — The secretary of an incorporated garage and auto repair company has the implied authority under this section to settle claims made for damages upon the corporation, and one so dealing with him therein will not be bound by a secret limitation of his authority; and upon his own testimony that he was the proper one to be dealt with in this respect, the question of the corporation's liability for his promise to pay the claim is properly presented. *Beck v. Wilkins-Ricks Co.*, 186 N. C. 210, 119 S. E. 235.

## ART. 5. CAPITAL STOCK

### § 1156. Classes of stock.

Every corporation has power to create two or more kinds of stock of such classes, with such designations, preferences, and voting powers or restriction or qualification thereof as are prescribed by those holding [a majority] two-thirds of its outstanding capital stock; and the power to increase or decrease the stock as herein elsewhere provided applies to all or any of the classes of stock; and the preferred stock may, if desired, be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the certificate thereof; and the holders thereof are entitled to receive, and the corporation is bound to pay thereon, a fixed yearly dividend, to be expressed in the certificate, payable quarterly, half-yearly or yearly, before any dividend is set apart or paid on the common stock, and such dividends may be made cumulative. In case of insolvency, its debts or other liabilities shall be paid in preference to the preferred stock. No corporation shall create preferred stock except by authority given to the board of directors by a vote of at least [a majority] two-thirds of the stock voted at a meeting of the common stockholders, duly called for that purpose. [*Provided*, that no new class of stock shall hereafter be created entitled to dividends or shares in distribution of assets in priority to any class of preferred stock already

outstanding except with the consent of the holders of record of two-thirds (or such greater amount as may be specified in the charter) of the number of shares of such outstanding preferred stock having voting powers.] The terms "general stock" and "common stock" are synonymous. [Provided further that the portions of this section in brackets shall be applied to all corporations other than banks and building and loan associations.] Rev., s. 1159; 1901, c. 2, s. 19; 1903, c. 660, ss. 2, 3; 1925, c. 118, ss. 2, 2a.)

**§ 1157. Stock to be paid in money or money's worth; issue for labor or property.**

**Judgment of Directors Arbitrary.**—This section makes the judgment of the board of directors in fixing the value of property of its subscribers to its shares of stock to be accepted in lieu of money arbitrary and of artificial weight, in the absence of fraud; and where there is no evidence of fraud therein, a judgment as of nonsuit is properly granted. *Gover v. Malever*, 187 N. C. 774, 122 S. E. 841.

**§ 1160. Liability for unpaid stock.**

**In General.**—Both under general principles of corporate law, appertaining to the subject, and by this section, stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538; *McIver v. Hardware Co.*, 144 N. C. 478, 57 S. E. 169; *Claypoole v. McIntosh*, 182 N. C. 109, 111, 108 S. E. 433.

**§ 1164. Transfer of shares.**

**In General.**—Although shares of stock are personal property and are transferable on the books of the corporation as provided by the by-laws, such provision, it is held, can be of no practical benefit to those not connected with the corporation, because they have "no means of knowing whether the transfer has been made or not." *Castelloe v. Jenkins*, 186 N. C. 166, 172, 119 S. E. 202.

**ART. 5(A). CAPITAL STOCK WITHOUT NOMINAL OR PAR VALUE**

**§ 1167 (a). Corporations which may create shares without nominal or par value. Classes of stock or debentures.**

Any corporation heretofore or hereafter organized under the laws of this State, whether under a special act of Legislature or otherwise, except banks, trust companies, railroad companies and insurance companies, may, in its original certificate of incorporation, articles of association, charter or any amendment thereof, create shares of stock with or without nominal or par value, and may create two or more classes of stock or debentures, any class or classes of which may be with or without nominal or par value, with such designations, preferences, voting powers, restrictions and qualifications as shall be fixed in such certificate of incorporation, articles of association, charter or amendment thereof, or by resolution adopted by those holding two-thirds of the outstanding capital stock entitled to vote. Subject to any provisions so fixed, every share without nominal or



par value shall equal every other such share. (1921, c. 116, s. 1; 1925, c. 262, s.)

**Editor's Note.**—By the amendment of 1925 several changes were made in this section. The provisions for creation of different classes by resolution of stockholders is new. The provision that any class may be without par value, the reference to special acts of the legislature, the words "charter" and "designations" were also inserted by this act.

### **§ 1167 (b). Stock issues; payment for stock; terms and manner of disposition.**

The provisions of law relating to the issuance of stock with par value shall apply to the issuance of stock without nominal or par value, and such corporation may issue and dispose of its authorized shares without nominal or par value for such consideration and on such terms and in such manner as may be determined or approved from time to time by the board of directors, subject to such conditions or limitations as may be contained in the certificate of incorporation, articles of association, charter, or any amendment thereof or as may be contained in any vote of the holders of a majority of the stock of the corporation, such consideration to be in the form of cash, property, tangible or intangible, services or expenses. Any and all shares without nominal or par value issued for the consideration determined or approved in accordance with the provisions of this section shall be fully paid and not liable to any further call or assessment thereon, nor shall the subscriber or holder be liable for any further payments. (1921, c. 116, s. 2; 1925, c. 262, s.)

**Editor's Note.**—The most important change in this section by the Acts of 1925 makes the terms of issuance of non-par stock subject to conditions imposed by a vote of the stockholders. The phraseology of the section is also greatly changed.

### **§ 1167 (d). Amendments to existing charters.**

Any such corporation heretofore organized, whether under a special act of Legislature or otherwise, having outstanding shares either with or without nominal or par value, may amend its certificate of incorporation of association or charter, as follows:

(a) So as to change its shares with nominal or par value or any class thereof into an equal number of shares without nominal or par value; or

(b) So as to provide for the exchange of its shares with nominal or par value, or any class thereof, for an equal or different number of shares without nominal or par value; but all outstanding shares in any class shall be exchanged on the same basis; or

(c) So as to provide for the exchange of its shares without nominal or par value, or any class thereof, for a different number of shares without nominal or par value; but all outstanding shares in any class shall be exchanged on the same basis:

*Provided, however,* the preferences on liquidation, redemption price, dividend rate and like preferences or limitations lawfully granted or imposed with respect to any class of outstanding stock

so changed or exchanged under the provisions hereof, shall not be impaired, diminished or changed as to any nonassenting holders thereof. Such preferences, rights and limitations, however, may be expressed in dollars, or in cents, per share rather than by reference to par value. Whenever such a corporation has heretofore issued shares without nominal or par value, in exchange for an equal or different number of shares with par value, such exchange and the issue of an equal or different number of shares without nominal or par value in consummation of such exchange, be and the same are hereby validated, ratified and confirmed. (1921, c. 116, s. 4; 1925, c. 262, s. 3.)

**Editor's Note.**—The proviso at the end of this section is new with the Acts of 1925 as are the provisions as to the basis of exchange.

#### ART. 6. MEETINGS, ELECTIONS AND DIVIDENDS

##### § 1179. Dividends from profits only; directors' liability for impairing capital.

**Fraudulent Representation that Dividend is Earned.**—Evidence that the agent for the sale of shares of stock in a corporation, had induced the defendant to purchase by falsely representing that a dividend would be credited upon his note given for the shares, is in effect a representation that the corporation had earned the dividend as represented, in this section; and it may be received as a circumstance of fraud, together with other evidence tending to establish it. *Seminole Phosphate Co. v. Johnson*, 188 N. C. 419, 124 S. E. 859.

**Liability of Director.**—A director of a corporation who has not brought himself within the provisions of this section, exonerating him from liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two-thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. *Claypoole v. McIntosh*, 182 N. C. 109, 108 S. E. 433.

#### ART. 7. FOREIGN CORPORATIONS

##### § 1181. Requisites for permission to do business.

**Contract Not Avoided for Noncompliance.** — This section, requires a foreign corporation, before doing business in this State, to file its charter, etc., with our Secretary of State, with an attested statement showing the amount of stock authorized and issued, its principal place of business, the name of its agent in charge, names and post office address of its officers and directors, etc., and in case of failure to comply, imposes a penalty of \$500 to be recovered by a suit to be prosecuted by the Attorney-General. And it was held that from the character of the act and its evident purpose the contracts of a foreign corporation doing business in the State without compliance were not avoided, but that the penalty alone was enforceable, and by action as the statute prescribed, but in the instant case the sales of the kind presented are directly prohibited, are made a criminal offense, and it is in terms declared that the statute is enacted for the purpose of protecting the public from "deception and fraud." *Miller v. Howell*, 184 N. C. 119, 122, 113 S. E. 621.

##### § 1181 (a) Sale of shares of stock held by life tenant.

The shares of the capital stock of a foreign corporation, in which any person owns a life estate, may be sold by an order in a special



proceeding, unless prohibited by the instrument under which such title was acquired. All persons *in esse* who are interested in the property aforesaid shall be made parties to the proceedings. Whenever it appears from the petition, or otherwise, that among those interested are persons not in being, or who, because of some contingency, cannot be presently ascertained, such persons shall be made parties defendant by publication of notice of the proceeding, according to the usual practice, and a guardian *ad litem* shall be appointed for them, and he shall file answer, as provided by sections four hundred and fifty-two and four hundred and fifty-three of the Consolidated Statutes of North Carolina. The clerk of the Superior Court shall have power to make, from time to time, appropriate orders for the sale of said shares of stock, and for handling, securing and investing the net proceeds of sale. In lieu of the payment to the life tenant of the income and profits on the net proceeds of sale, the clerk may order the present cash value of the life tenant's share, ascertained as by law provided, to be paid to the life tenant absolutely, out of said proceeds, and order the balance thereof to be invested and kept invested for the remaindermen, or paid over to a trustee appointed for the purpose, after the trustee shall have qualified by filing with the clerk an undertaking, to be approved by him, payable to the State of North Carolina, for the benefit of the remaindermen, in a sum double the amount of the balance of the net proceeds aforesaid, and conditioned for the prompt forthcoming and payment of the principal and interest or income thereof, and the faithful performance of duty and compliance with the orders of court relating thereto. The orders aforesaid shall be approved by the judge of the Superior Court residing in or holding the courts of the district, where such approval is now required by law. (1925, c. 59.)

#### ART. 8. DISSOLUTION

##### § 1185. Involuntary, at instance of private persons.

**Construed with Section 1186.**—This section is not affected by the later statute, ch. 147, laws 1913 (Code sec. 1186) requiring that a shareholder should own one-fifth of the stock, or that the corporation has failed to earn certain dividends, etc.; for this applies to going concerns, nor does the principle apply which requires him to first make application to the management to take this course, for this relates to suits concerning corporate management; and the judge having the matter before him in the course and practice of the courts "has jurisdiction of all questions arising in the proceeding to make such orders, injunctions, and decrees therein as justice and equity shall require, at any place in the district." *Lasley v. Walnut Cove Mercantile Co.*, 179 N. C. 575, 103 S. E. 213.

##### § 1186. Involuntary, by stockholders.

**Action to Dissolve for Nonuse of Powers.**—This section is intended to control and regulate suits for the dissolution of a corporation doing business as a going concern, and by reason of the fact that they have not earned for three years next preceding the filing of the petition in net dividend of 4 per cent, or who have not paid a dividend for six years, and clearly has no application to an action to dissolve a corporation for nonuse of its powers, the case presented on this record. *Lasley v. Wal-*

nut Cove Mercantile Co., 179 N. C. 575, 577, 103 S. E. 213. See note of this case under the section immediately preceding.

### § 1187. Involuntary, by attorney-general.

**In General.**—"The Attorney-General is authorized to bring an action in the name of the State against a corporation for the purpose of annulling its charter on the ground that it was procured for fraud or the concealment of a material fact by the persons incorporated, or by some of them, or by others with their knowledge or consent. He may bring such action for the purpose of annulling the existence of a corporation, other than municipal, when such corporation offends against the act creating, altering, or renewing it, or violates any law by which it has forfeited its charter by abuse of its power or has forfeited its privileges or franchises by failure to exercise its powers, or has done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises, or has exercised a franchise or privilege not conferred upon it by law, or when it has done certain other acts not germane to the present investigation." *Manning v. Railroad Co.*, 188 N. C. 648, 656, 125 S. E. 555.

**Area of Rural Community Misrepresented.**—The right of action is given the Attorney-General, on the relation of the State, to annul a certificate of incorporation of a rural community when the petition upon which the Secretary of State has issued the certificate misrepresents that the area of the community to be incorporated extended only to that of "one entire school district," C. S., 7380, 7381, under the provisions of this section, authorizing the Attorney-General to bring action when a certificate of incorporation has been procured upon "a fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge or consent," etc. *State v. Rural Community*, 182 N. C. 861, 109 S. E. 576.

### § 1193. Corporate existence continued three years.

**In General.**—The certificate of dissolution of a corporation of the Secretary of State continues the corporation for three years, making the directors trustees unless otherwise ordered by the court, with full power, among others specified, to settle its affairs, close its business, etc., this section, and the provisions of the following section, 1194, that the directors as trustees may sell and convey the corporate property, does not exclude the idea that they may do so in the name of the corporation in whom the original legal title was originally vested. *Lowdermilk v. Butler*, 182 N. C. 502, 109 S. E. 571.

**Deed from Dissolved Corporation.**—Where the certificate of the probate of a deed from a corporation, dissolved upon certificate of the Secretary of State, made within the time allowed by this section, recites as a fact judicially found that the deed was made in the name of the corporation by the order of the directors, the trustee's, under the statute, objection that it was not executed in the method required by C. S., 1194, is untenable; and the signature of the agent in charge, if made upon the mistake that he was in law the assignee of the mortgage, is only surplusage, and harmless. *Lowdermilk v. Butler*, 182 N. C. 502, 109 S. E. 571.

### § 1194. Directors to be trustees; powers and duties.

See notes to section 1193.

### § 1197. Wages for two months lien on assets.

**Agent Having Authority to Deduct Salary.**—Under this section an agent with authority to make collections and to deduct his salary and expenses from the sums collected, has no lien for claims for salary and expenses owing before his appointment to the position. *Cummer Lumber Co. v. Seminole Phosphate Co.*, 189 N. C. 206, 126 S. E. 511.



## ART. 10. RECEIVERS

**§ 1214. Property sold pending litigation.**

When the property of an insolvent corporation is at the time of the appointment of a receiver incumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of incumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale, to be disposed of as the court directs. [And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least ten days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular term of the Superior Court of the county in which the property is situated.] (Rev., s. 1232; 190, c. 2, s. 86; Extra Sess. 1924, s. 13.)

**Applicable to Pending Litigation.**—"The statute is a remedial one and relates only to the method of procedure in dealing with certain assets of an insolvent corporation. Such statutes, unless otherwise limited, are usually held to be applicable to pending litigation, where the language used clearly indicates that such construction was intended by the Legislature, and especially where no hardship or injustice results, and the rights of the parties are thereby better secured and protected." *Martin v. Vanlaningham*, 189 N. C. 656, 127 S. E. 695, 696.

**Amendment of 1924.**—The amendment to this section effected by the act of 1924 is applicable to suits pending at the time it took effect. *Martin v. Vanlaningham*, 189 N. C. 656, 127 S. E. 695.

## ART. 13. MERGER

**§ 1224 (a). Merger, proceedings for.**

Any two or more corporations organized under the provisions of this chapter, or existing under the laws of this State, for the purpose of carrying on any kind of business, may consolidate into a single corporation which may be either one of said consolidated corporations or a new corporation to be formed by means of such consolidation; the directors, or a majority of them, of such corporations as

desire to consolidate, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of consolidation, the mode of carrying the same into effect, and stating such other facts as are necessary to be set out in the certificate of incorporation, as provided in this chapter, as well as the manner and basis of converting the shares of each of the old corporations into stock of the new corporation, with such other details and provisions as are deemed necessary or desirable.

Said agreement shall be submitted to the stockholders of each corporation, at a meeting thereof, called separately for the purpose of taking the same into consideration; of the time, place and object of which meeting due notice shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each corporation either has its principal office or conducts its business (and if there be no newspaper published in such county, then in a newspaper published in an adjoining county), and a copy of such notice shall be mailed to the last known postoffice address of each stockholder of each corporation, at least twenty days prior to the date of such meeting, and at said meeting said agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same, each share entitled to vote entitling the holder thereof to one vote; and if the votes of the stockholders of each corporation representing a majority of the outstanding shares of stock entitled to vote shall be for the adoption of the said agreement, then that fact shall be certified on said agreement by the secretary of each corporation, under the seal thereof; and the agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of said corporations under the corporate seals thereof and acknowledged by the president or vice-president for each of such corporations before any officer authorized by the laws of this State to take acknowledgments of deeds to be the respective act, deed and agreement of each of said corporations, and the agreement so certified and acknowledged shall be filed in the office of the Secretary of State, and shall thence be taken and deemed to be the agreement and act of consolidation of the said corporation; and a copy of said agreement and act of consolidation, duly certified by the Secretary of State under the seal of his office, shall also be recorded in the office of the clerk of the Superior Court of the county of this State in which the principal office of the consolidated corporation is, or is to be, established, and in the offices of the clerks of the Superior Courts of the counties of this State in which the respective corporations so consolidating shall have their original charters recorded, or if any of the corporations shall have been specially created by a public act of the Legislature, then said agreement shall be recorded in the county where such corporation shall have had its principal office, and also in the office of the register of deeds of each county in which either or any of the corporations entering into the consoli-



dation owns any real estate, and such record or a certified copy thereof, shall be evidence of the existence of the corporation created by the said agreement, and of the observance and performance of all antecedent acts and conditions necessary to the creation thereof. (1925, c. 77, s. 1.)

### **§ 1224 (b). Merger; status of old and new corporations.**

When the agreement is signed, acknowledged, filed and recorded, as in the preceding section is required, the separate existence of the constituent corporations shall cease, and the consolidating corporations shall become a single corporation in accordance with the said agreement, possessing all the rights, privileges, powers and franchises, as well of a public as of a private nature and all and singular the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed and all debts due on whatever account, and all other things in action or belonging to each of such corporations, shall be vested in the consolidated corporation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective former corporations, and the title to any real estate, whether by deed or otherwise, under the laws of this State, vested in either of such corporations, shall not revert or be in any way impaired by reason of this article: *Provided*, that all rights of creditors and all liens upon the property of either of said former corporations shall be preserved unimpaired, limited in lien to the property affected by such liens at the time of the consolidations, and all debts, liabilities and duties of the respective former corporations shall thenceforth attach to said consolidated corporation, and may be enforced against it to the same extent as if said debt, liabilities and duties had been incurred or controlled by it.

Before receiving stock in the new or consolidated corporation, the shareholders of the old corporation shall surrender to the new corporation their certificates of stock in such old corporations; and the same shall be canceled by the new corporation upon the delivery of the stock in the new corporation. If any certificate of stock in any of the old corporations shall have been lost, destroyed or misplaced, the owner thereof shall have the right to receive from the new corporation stock therein to be issued for the value of the old stock lost, destroyed or misplaced; and the new or consolidated corporation shall have the right to require from such person indemnity against loss on account of the issue of the stock so applied for, in the manner provided by law for the reissue of lost stock. If the person owning such lost, destroyed or misplaced certificate in one of the old corporations, shall be dissatisfied with the terms of the merger and shall object thereto, he shall have the same right to have the value of his stock appraised and paid for, and to appeal to the courts, as is provided herein for other dissatisfied stockholders, upon giving security and indemnifying the new corporation against loss on ac-

count of the payment for such lost, destroyed or misplaced certificate of stock. (1925, c. 77, s. 1.)

**§ 1224 (c). Merger; payment for stock of dissatisfied stockholders.**

If any stockholder entitled to vote in either corporation consolidating as aforesaid shall vote against the same, or if any stockholder in either corporation consolidating as aforesaid, not entitled to vote therein, shall, at or prior to the taking of the vote, object thereto in writing, and if such dissenting or objecting stockholder shall, within twenty days after the agreement of consolidation has been filed and recorded as aforesaid, demand in writing from the consolidated corporation payment of his stock, such consolidated corporation shall within thirty days thereafter pay to him the value of the stock at the date of the consolidation; in case of disagreement as to the value thereof, it shall be lawful for any such stockholder or stockholders within thirty days after he has made demand in writing as aforesaid, and upon reasonable notice to the consolidated corporation, to appeal by petition to the Superior Court of the county in which the principal office of the consolidated corporation is, or is to be, established, to appoint three appraisers to appraise the value of his stock. The award of the appraiser (or a majority of them), if not opposed within ten days after the same shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive; and if opposed and excepted to, the exceptions shall be transferred to the civil issue docket of the Superior Court, and there tried in the same manner, as near as may be practicable, as is provided in section one thousand seven hundred and twenty-four, chapter thirty-three, volume one, the Consolidated Statutes, for the trial of exceptions to the appraisal of land condemned for public purposes, and with the same right of appeal to the Supreme Court as is permitted in said chapter. The court shall assess against the consolidated corporation the costs of said proceedings, including a reasonable attorney's fee to the stockholder and a reasonable fee to the appraisers as it shall deem equitable. On the making of said demand in writing as aforesaid, any such stockholder or stockholders shall cease to be stockholders in said constituent company and shall have no rights with respect to such stock except the right to receive payment therefor as aforesaid, and upon payment of the agreed value of the stock or of the value of the stock under final judgment, said stockholder or stockholders shall transfer their stock to the consolidated corporation; and in the event the consolidated corporation shall fail to pay the amount of said judgment within ten days after the same shall become final, said judgment may be collected and enforced in the manner prescribed by law for the enforcement of judgment. Each stockholder in either of the constituent corporations at the time the consolidation becomes effective, entitled to vote, who does not vote against the consolidation and each stockholder in each of the constituent corporations at the time the consolidation becomes effective,



not entitled to vote, who does not object thereto in writing as aforesaid, shall cease to be a stockholder in such constituent corporation and shall be deemed to have assented to the consolidation together with the stockholders voting in favor of the consolidation in the manner and on the terms specified in the agreement of consolidation. (1925, c. 77, s. 1.)

**§ 1224 (d). Merger; pending action saved.**

Any action or proceeding pending by or against either of the corporations consolidated may be prosecuted to judgment, as if such consolidation had not taken place or the new corporation may be substituted in its place. (1925, c. 77, s. 1.)

**§ 1224 (e). Liability of corporations and rights of others unimpaired by consolidation.**

The liability of corporations created under this chapter, or existing under the laws of this State, or the stockholders or officers thereof, or the rights or remedies of the creditors thereof, or of persons doing or transacting business with such corporation, shall not in any way be lessened or impaired by the consolidation of two or more corporations under the provisions hereof. (1925, c. 77, s. 1.)

**§ 1224 (f). Powers of consolidated corporations.**

When two or more corporations are consolidated, the consolidated corporation shall, subject to all the laws of this State, have power and authority to issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payment it will be required to make, or obligations it will be required to assume, in order to effect such consolidation; to secure the payment of which bonds and obligations it shall be lawful to mortgage its corporate franchise, rights, privileges and property, real, personal and mixed; and may issue capital stock, with or without par value, or in classes any class of which may be with or without par value, to such an amount as may be necessary, to the stockholders of such consolidated corporation in exchange or payment in whole or part for the original shares, in the manner and on the terms specified in the agreement of consolidation. (1925, c. 77, s. 1.)

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CHAPTER 23

**COSTS**

ART. 1. GENERALLY

**§ 1229. Jurors' tax fees.**

**Failure to List Taxes.**—The plea of guilty to an indictment for failure to list taxes as required by the Revenue Act comes within the intent

and meaning of this section requiring in criminal cases a tax of \$4 against the "party convicted or adjudged to pay the cost," and applies whether the jury has been impaneled or not; and the tax of \$5 in the civil actions should be imposed as a part of the costs, when the jury has been impaneled. This but evidences the legislative intent to draw this distinction between criminal and civil actions, the reason therefor, though apparent, being immaterial in construing the meaning of the statute. *State v. Smith*, 184 N. C. 728, 114 S. E. 625.

### ART. 3. CIVIL ACTIONS AND PROCEEDINGS

#### **§ 1241. Costs allowed plaintiff; limited by recovery; several suits on one instrument.**

**When Damages Less than 50 Dollars.**—Where the recovery of damages in a civil action of assault is less than fifty dollars, the plaintiff recovers no more costs than damages. *Smith v. Myers*, 188 N. C. 551, 125 S. E. 178.

**Where Disclaimer of Ownership.**—The protestants, under the provisions of C. S., 7557, claimed the original entry, C. S., 7554, was not for the State's vacant and unappropriated lands, but that they were the owners of the entire tract. After the evidence had been introduced, the protestant's disclaimed ownership of half of the locus in quo. There was no reversible error in the judgment in protestant's favor. (*Nelson v. Lineker*, 172 N. C. 279); but held, the enterer was entitled to judgment declaring the remainder of the lands covered by the entry to be vacant and unappropriated, and for costs. *In re Hurley*, 185 N. C. 422, 117 S. E. 345.

#### **§ 1243. Costs allowed or not, in discretion of court.**

**Costs Taxed Equally.**—Upon a trial without error the jury found that each party was entitled to an undivided half in the land, and the appeal being from taxing the defendant with costs, there being no element of an action in ejectment, it is held, error, neither party being permitted to recover cost from the other, especially, as in this case the question being of an equitable nature, the taxing of costs is, under this section, in the sound discretion of the court; and they are taxed equally against both parties. *Hare v. Hare*, 183 N. C. 419, 111 S. E. 620.

#### **§ 1244. Costs allowed either party or apportioned in discretion of court.**

**Attorneys' Fees.**—In proceedings to partition lands held in common among the heirs at law of the deceased, including the question of dower and the claim of widow to be allowed a certain fee-simple interest by contract, the court is without authority to allow attorneys' fees as a part of the costs, the same not being included in this section. The case differentiated from those wherein the employment of counsel was found necessary to protect the rights of infants represented by guardian in litigation, and other analogous cases. *Ragan v. Ragan*, 186 N. C. 461, 119 S. E. 882.



## CHAPTER 24

**COUNTIES AND COUNTY COMMISSIONERS**

## ART. 1. CORPORATE EXISTENCE AND POWERS OF COUNTIES

**§ 1291 (a). Limitation on county indebtedness.**

No county in this state shall incur bonded indebtedness in an amount exceeding five per cent of the assessed valuation of taxable property in the county as ascertained by the last assessment previous to the incurring of any new bonded indebtedness. [*Provided, however, that any county in which the assessed valuation of taxable property, as shown by the last assessment previous to the incurring of any new bonded indebtedness, is not in excess of ten million dollars (10,000,000) may issue bonds in an amount not exceeding eight per cent (8%) of said assessed valuation: Provided further, that any county in which the assessed valuation of taxable property in the county, as ascertained by the last assessment previous to the incurring of any new bonded indebtedness, is in excess of ten million dollars (\$10,000.00) but not in excess of twenty million dollars (\$20,000,000) may issue bonds in an amount not exceeding seven per cent (7%) of said assessed valuation.*]

The portions of this section in brackets shall not apply to Brunswick County.] (Ex. Sess. 1920, c. 3, s. 6; Ex. Sess. 1924, c. 100.)

## ART. 2. COUNTY COMMISSIONERS

**§ 1297. Powers of board.**

The board of commissioners of the several counties have power—  
10. *To designate site for county buildings.* To remove or designate a new site for any county building; but the site of any county building already located shall not be changed, unless by an unanimous vote of all the members of the board at [any regular monthly] meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, and posted in one or more public places in every township in the county for three months, next immediately preceding the [monthly] meeting at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the general assembly. (Rev., s. 1318; Code, 707; 1868, c. 20, s. 8; 1925, c. 229.)

**Editor's Note.**—The subsection printed above was the only portion of this section affected by the Acts of 1924 and 1925. The notes following, however, are not confined to this subsection.

**Unlawful Acquisition of New Site for Courthouse.**—This section, limits the power of the county commissioners to abandon an existing courthouse and acquire a new site therefor to the methods therein stated, by a unanimous vote of the members of the board of county commissioners at their annual December meeting, and due notice given throughout the

county that a final vote would then be taken, so that the proposition, before final action, may be examined into; and where the county commissioners, in anticipation of the change, upon the recommendation of the grand jury, have conditionally purchased the new site, have given their note for the purchase price, upon which payments have subsequently been made, and this note and deed to the lands so to be acquired have been placed in escrow, compliance with these conditions is a positive statutory requirement, and the seller of the lands acquires no rights otherwise; and upon the failure of such legal requirement, both the deed and note are void and unenforceable, leaving the parties in statu quo. *Hearne v. County*, 188 N. C. 45, 123 S. E. 641.

**Same—Attempt to Validate.**—Pending the continuance of an injunction against the county commissioners purchasing a new site for the county courthouse, the action of the commissioners in attempting to validate their former action is unlawful, and can have no effect; nor can proceedings under a later statute to submit the question of the change to the voters have a different effect, when this proposition has been rejected by them. *Hearne v. Board of Comm'rs*, 188 N. C. 45, 123 S. E. 641.

**Same—Recovery of Part Payments.**—Where the county commissioners and the owner of lands have agreed for the purchase of a new site for its courthouse, conditioned upon the future compliance, with the statute relating thereto, which had failed of compliance, and the county had made certain payments upon the purchase price, the county may recover the partial payments it had so made, with the legal interest thereon, subject to deduction as against the interest of its reasonable rental value, while in the possession and control of the county authorities. *Hearne v. Board of Comm'rs*, 188 N. C. 45, 123 S. E. 641.

**Question of Public Roads.**—The building and maintenance of public roads of a county is a necessary county expense, and being authorized by statute the question is not required by the Constitution to be submitted to the voters for approval. Const., Art. VII, sec. 2; this section, (19); C. S., 1325. *Lassiter v. Board of Comm'rs*, 188 N. C. 379, 124 S. E. 738.

**Same—Contracts between County Commissioners and State.**—The State Highway Commission and the county boards of commissioners are alike agencies of the State for the building and maintenance of public roads, with statutory differences as to national and county highways, etc., and may contract with each other relative thereto in accordance with provisions stated by the statutes on the subject. *Lassiter v. Board of Comm'rs*; 188 N. C. 379, 124 S. E. 738.

**Same—Same—Determining Route.**—Where there are two routes by which the State Highway Commission may construct and maintain a national highway from a county seat, and by one of them largely traveled it would relieve the county of great cost in maintenance, and in the straightness of curves relieve the road in certain places of dangerous conditions, and also large expenditure for a bridge, etc., if such route were accepted and constructed and maintained by the State Highway Commission, it is within the discretionary powers conferred by the statute for the county to pay from its general fund, as a necessary county expense, the larger cost of this route over the other upon an agreement made to that effect. *Lassiter v. Board of Comm'rs*, 188 N. C. 379, 124 S. E. 738.

## § 1299. To settle disputed county lines.

When there is any dispute concerning the dividing line between counties, the board of commissioners of each county interested in the adjustment of said line, a majority of the board consenting thereto, may appoint one or more commissioners, on the part of each county,



to settle and fix the line in dispute; and their report, when ratified by a majority of the commissioners in each county, is conclusive of the location of the true line, and shall be recorded in the register's office of each county, and in the office of the secretary of state. [If the board of commissioners of any county refuses upon request of the other county or counties to appoint one or more commissioners pursuant to this section to settle and fix the line or lines in dispute, then, and in such event, the county or counties making such request may file a verified petition before the resident judge of the district in which the said county or counties lie, or the judge holding the courts thereof for the time being, and in the event that said counties shall lie in more than one judicial district, to the resident judge or the judge holding the courts of either district, setting forth briefly the line or lines which are in dispute; the refusal of the other county or counties to settle and fix the line in dispute, pursuant to this section; whereupon, such judge before whom such petition is filed shall issue a notice to the other county or counties, returnable before him within not less than ten nor more than twenty days, and if it appear to such judge upon hearing said notice, and he shall find as a fact that there is bona fide dispute as to the true location of the boundary line or lines referred to in the petition and that the county or counties have refused to settle and fix the line in dispute as provided in this section, such judge shall thereupon appoint three (3) persons, one person from each of the counties and some disinterested person from some adjoining county, who shall go upon the ground, hear such evidence and testimony as shall be offered and make report to the said judge as to the true location of the boundary line or lines in dispute. The judge shall thereupon ratify the report and a copy thereof shall be recorded in the office of the register of deeds of each of the counties and shall be indexed and cross indexed and shall also be recorded in the office of the Secretary of State and the location so fixed shall be conclusive. If it shall appear to the judge that the services of a surveyor are necessary he shall appoint such surveyor and fix his compensation. The cost thereof shall be defrayed by the two counties in proportion to the number of taxable polls in each.] (Rev., s. 1332; Code, s. 721; R. C., c. 27; 1836, c. 3; 1925, c. 251.)

#### ART. 4. CLERK TO BOARD OF COMMISSIONERS

##### § 1310. Duties of clerk.

**Correction of Record.**—The clerk of the Superior Court is ex officio clerk of the board of county commissioners, and required to correctly record all of its proceedings; and while the record of the board so made as to the levy of a tax may not be impeached in a suit brought by a taxpayer against the sheriff to enjoin the collection of the tax, upon the ground of its unconstitutionality, it may be corrected nunc pro tunc by the board of commissioners itself to speak the truth, and this case is remanded, to the end that the commissioners may be made a party to that end. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534.

ART. 6. COURTHOUSE AND JAIL BUILDINGS

**§ 1321 (d). Limitation of amount.**

No board of commissioners shall, for the purposes expressed in sections 1321 (a) to 1321 (i), issue bonds or notes under authority of these sections to exceed two per cent of the assessed valuation of the property in the county for the year next preceding the issuance thereof. (1923, c. 143, s. 9; 1924, c. 113.)

**Editor's Note.**—By the Act of 1924, the maximum was raised from one to two per cent of the assessed valuation.

**§ 1321 (i). Powers granted by law additional.**

**Authority Cumulative.**—In *Blair v. Board of Comm'rs*, 187 N. C. 488, 490, 122 S. E. 298, the court said: "It clearly appears, we think, from the 9th section of the General Act now before us, (this section of the consolidated statutes) that the authority granted under this law was to be in addition to and not in substitution of any existing powers contained in any other law. Hence no conflict was intended and none exists between the provisions of the General Act and the New Hanover Act. The present case, therefore, falls directly within the doctrine announced in *Kinston v. Atlantic, etc., R. Co.*, 183 N. C. 14, 110 S. E. 645, and *Fawcett v. Mt. Airy*, 134 N. C. 125, 145 S. E. 1029, to the effect that, having exhausted the powers conferred under the special act, the authorities may proceed under the general statute to the extent allowed by such law."

ART. 7. COUNTY REVENUE

**§ 1325. Expenditure of county funds directed by commissioners.**

**Question of Public Roads.**—The building and maintenance of public roads of a county is a necessary county expense, and being authorized by statute the question is not required by the Constitution to be submitted to the voters for approval. Const., Art. VII, sec. 2; C. S., 1297 (18), (19); C. S., 1325. *Lassiter v. Board of Comm'rs*, 188 N. C. 379, 124 S. E. 738. See notes of this case under section 1297.

ART. 9. COUNTY PRISONERS

**§ 1359. Convicts who may be sentenced to or worked on roads.**

**Husband Convicted of Abandonment.**—A sentence may be imposed of imprisonment upon a husband convicted of abandonment under C. S., 4447, and other offenses of like kind, or to assign them to work on the roads during their term. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

**§§ 1382 (a)-1382 (i).**

(Repealed 1925, c. 218.)



## CHAPTER 26

**COUNTY TREASURER****§ 1389. Local: Commissioners may abolish office and appoint bank.**

In the counties of Bladen, Carteret, Chatham, Cherokee, Chowan, Craven, Edgecombe, Granville, Hyde, Madison, Mitchell, Montgomery, Martin, Moore, Onslow, Perquimans, Polk, Rowan, Stanly, Tyrrell, [Transylvania,] and Union, the board of county commissioners is hereby authorized and empowered, in its discretion, to abolish the office of county treasurer in the county; but the board shall, before abolishing the office of treasurer, pass a resolution to that effect at least sixty days before any primary or convention is held for the purpose of nominating county treasurer. When the office is so abolished, the board is authorized, in lieu of a county treasurer, to appoint one or more solvent banks or trust companies located in its county as financial agent for the county, which bank or trust company shall perform the duties now performed by the treasurer or the sheriff as *ex officio* treasurer of the county. Such bank or trust company shall not charge nor receive any compensation for its services, other than such advantages and benefit as may accrue from the deposit of the county funds in the regular course of banking, [or such sum as may be agreed upon as compensation between said board of county commissioners of Transylvania County and such bank or banks as may be designated by said board of county commissioners. But the part of this act in brackets shall apply only to Transylvania county]. The bank or trust company, appointed and acting as the financial agent of its county, shall be appointed for a term of two years, and shall be required to execute the same bonds for the safe keeping and proper accounting of such funds as may come into its possession and belonging to such county and for the faithful discharge of its duties, as are now required by law of county treasurers. (1913, c. 142; Ex. Sess. 1913, c. 35; P. L. 1915, cc. 67, 268, 458, 481; 1919, c. 48; 1925, c. 46.)

**Constitutionality.**—Through section 1 Art. VII of the court provides in terms that for the ordinary purposes of general county government there shall be elected a county treasurer, etc., it is yet within the legislative authority to so modify this requirement that they may delegate to the county commissioners the authority to abolish the position of county treasurer and appoint a bank or banks to act in this capacity for the consideration only which may arise to them from a deposit therein of the taxes collected; and this section is constitutional and valid. *Tyrrell v. Holloway*, 182 N. C. 64, 108 S. E. 337.

**Mandamus against Treasurer.**—Where, under the power of this section the county commissioners have abolished the office of county treasurer, and have vested the duties of the office in certain banks and trust companies which have qualified thereunder, mandamus will lie to compel the treasurer, seeking to hold over and denying the validity of the statute, to turn over to the proper party the moneys that he has received and attempts to hold by virtue of his former office. *Tyrrell v. Holloway*, 182

N. C. 64, 108 S. E. 337. See notes of this case under Const., sec. 14, Art. VII.

### § 1400. Treasurer to deliver books, etc., to successor.

**Action Not a Money Demand.**—An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agents regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes directly applicable, this section and §§ 3205, 3206, 4385, is not in strictness a money demand, under section 867, which must be proceeded with as an ordinary civil action, requiring a finding of disputed facts by a jury, but comes under section 868, providing that the summons may be returnable before the judge at chambers or in term, who shall determine all issues of law and fact unless a jury is demanded by one or both of the parties, which, in the instant case, comes too late, being taken for the first time without exception in an additional brief allowed to be filed after the argument of the case in the Supreme Court has been made. *Tyrrell v. Holloway*, 182 N. C. 64, 108 S. E. 337. See notes of this case under section 1389.

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## CHAPTER 27

### COURTS

#### Subchapter I. Supreme Court.

##### ART. 2. JURISDICTION

### § 1412. Power to render judgment and issue execution.

**In General.**—Under the technical rules of the common law a different rule prevailed, from that prescribed by this section and section 658, but the court of equity always followed this procedure, which was adopted by this state when the distinction between law and equity was abolished. One court having taken place of both law and equity, a joint judgment may be affirmed as to one defendant, and dismissed as to another. This has been the uniform course and practice since the blending of the two forms of procedure, and is expressly authorized by the sections cited above. The same practice has been followed in the courts of the other states which have adopted the modern system of practice. *Kimbrough v. R. R.*, 182 N. C. 234, 236, 109 S. E. 11.

**Proceedings to Modify Judgment.**—A judgment of the Superior Court may be modified on appeal where the plaintiff's right to remove adverse claims as a cloud upon his title to lands has been established, so as to enjoin, upon defendant's appeal, actions pending in the Superior Court involving the same equity and the same subject-matter, where the parties thereto have been made parties to the case at bar, the proceedings being in the nature of a bill of peace. *Ormand Mining Co. v. Gambrell*, etc., *Mills Co.*, 181 N. C. 361, 107 S. E. 216.

**Where a railroad company and the Director General of Railroads have both been joined as parties defendant** in an action to recover for a negligent injury, and issues have been submitted as to each, and adverse verdict rendered as to each, there can be no prejudice to the Director General in dismissing the action as to the railroad company and affirming it as to the Director General, and the same may be done under the provisions of C. S., 658 and this section. *Kimbrough v. Hines*, 182 N. C. 234, 109 S. E. 11.



**§ 1414. Power of amendment and to require further testimony.**

**Amendment When Nonresident Petitions for Removal.**—Where a nonresident defendant claims an interest in lands, in proceedings by a municipality against a resident owner to take it for a public use, and the nonresident has been made a party and files his petition and bond for removal to the Federal court for diversity of citizenship, the plaintiff may amend his pleadings on motion granted by the State court, under this section, and set up facts sufficient to show that the claim of the nonresident arose by contract that gave him no interest in the lands within the meaning of the Federal Removal Act. *Morganton v. Hutton, etc.*, Co., 187 N. C. 736, 122 S. E. 842.

## **Subchapter II. Superior courts**

### **ART. 4. ORGANIZATION**

**§ 1435 (a). Special or emergency judges; jurisdiction; compensation; expenses.**

**Jurisdiction of Matters of Mandamus.**—Emergency judges, appointed under the provisions of our statute as to Supreme and Superior court judges who have retired from active service in pursuance of the provisions of our Constitution, have no jurisdiction to hear and determine, at chambers, matters of mandamus, or when he is not holding a term of court assigned to him. *Dunn v. Taylor*, 186 N. C. 254, 119 S. E. 495. But see section 1435(b) as amended by the Acts of 1925, Ed. note.

**§ 1435 (b). Jurisdiction in injunction, receivership, and habeas corpus matters.**

The special or emergency judges provided for in the preceding section shall at all times have the same jurisdiction in matters of injunction, [mandamus] receivership, and habeas corpus as any other superior court judge. (Ex. Sess. 1921, c. 94, s. 1; 1925, c. 8.)

**§ 1435 (d). Emergency judge; appointment.**

Whenever the judge assigned to hold a Superior Court in any county or district, by reason of sickness, disability or other cause, is unable to attend and hold said court, and whenever no other judge is available to hold the same, the Governor of North Carolina shall appoint some person qualified, by and with the advice and consent of the Chief Justice of the Supreme Court of North Carolina, to hold said court, and the Governor shall issue a commission to said person so named and this commission shall constitute his authority to perform the duties of the office of judge of the Superior Court during the time named therein. (1925, c. 216, s. 1.)

**§ 1435 (e). For what terms appointed.**

The authority herein, pursuant to article four, section eleven, of the Constitution of North Carolina, conferred upon the Governor to appoint such emergency judges, shall extend to regular as well as special terms of the Superior Court, with either civil or criminal

jurisdiction, or both, as may be designated by the statute or by the Governor pursuant to the statutes. (1925, c. 216, s. 2.)

### **§ 1435 (f). Jurisdiction.**

Such emergency judge, during the time noted in the commission evidencing his appointment, shall have all the jurisdiction which is now or may be hereafter lawfully exercised by the presiding and resident judge of a district in which the court, or courts, to be held by such emergency judge shall have, including the power to hear and determine all matters in injunctions, receiverships, motions, habeas corpus proceedings and special proceedings on appeal or otherwise properly before him, but such jurisdiction shall be exercised by him in the district, or districts, in which said court, or courts, are to be held. (1925, c. 216, s. 3.)

### **§ 1435 (g). From what county appointed.**

No person shall be appointed pursuant to this act as emergency judge to hold court in the county in which such person shall reside. (1925, c. 216, s. 4.)

### **§ 1435 (h). Compensation.**

Such emergency judge shall receive as compensation for each week, or fractional part thereof, one hundred and fifty dollars and his actual expenses incurred in holding of the same, including his traveling expenses to and from his home, but only one trip from his home to such court and return shall be allowed for any one term of court, however many weeks may be included in said term. The State Auditor shall issue his warrant for said compensation upon the certificate of the clerk of the Superior Court of the county over whose court such emergency judge presided that he attended and presided over said court, in which certificate shall be set forth his actual expenses incurred in holding the same, including his traveling expenses, and the State Treasurer shall pay such warrant out of the general fund of the State. (1925, c. 216, s. 5.)

### **§ 1435 (i). Certification of appointment.**

Immediately upon the appointment of any emergency or special judge hereunder, the Governor shall immediately certify such appointment, together with the term thereof, to the State Auditor and to the clerk of the Superior Court of the county, or counties, in which such courts are to be held by such judges, and shall issue to such person so appointed a commission in usual form showing among other things the term of such appointment. (1925, c. 216, s. 6.)

### **§ 1435 (j). Expiration of provisions of sections 1435 (d) to 1435 (k).**

The provisions of sections 1435 (d) to 1435 (k) shall expire on the first day in March, nineteen hundred and twenty-seven. (1925, c. 216, s. 7.)



**§ 1435 (k). Cases on appeal after commission expires.**

Nothing herein shall be construed to prohibit such emergency judges from settling cases on appeal and making all proper orders in regard thereto after the time for which they were commissioned. (1925, c. 216, s. 8.)

**ART. 5. JURISDICTION****§ 1436. Original jurisdiction.**

See notes under §§ 519, 1473. As to jurisdiction of emergency judges, see notes to § 1435 (a).

**Constitutionality.**—The General Assembly has constitutional authority to distribute among the other courts prescribed in the Constitution, that portion of judicial power and jurisdiction which does not pertain to the Supreme Court. Const., Art. IV, sec. 12. *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482.

**Construction with Other Sections.**—This section defining the jurisdiction of the Superior Court, means only the jurisdiction which is necessary to be set out in good faith to confer original jurisdiction on that court of the action, and must be construed in connection with C. S., 507, authorizing a joinder of additional causes of action, which may be of "any" amount, and C. S., 519 (2), and 521 (1) and (2), authorizing counterclaims also, without any limitation as to the amount. Either of these three sections is as valid as the other, and all three must be construed together. There is no conflict between them. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

**Distribution of Jurisdiction Question of Procedure.**—The interpretation of the constitution and statutes as to the distribution of jurisdiction among the Superior and inferior courts, and courts of the justices of the peace, involves no rule of property, but only of procedure. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

**General Jurisdiction of Superior Court.**—The jurisdiction of the Superior Court is general and not limited, except in the sense that it has been narrowed from time to time by carving out a portion of this general jurisdiction and giving it, either exclusively or concurrently, to other courts. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

**Jurisdiction in Action Ex Contractu.**—By this section exclusive original jurisdiction is conferred on courts of a justice of the peace in actions ex contractu where the amount demanded does not exceed the sum of two hundred dollars, and in the Superior Court where the demand exceeds that sum, the jurisdiction of the latter court depending upon whether from the pleadings it may be seen that it was made in good faith, and whether the allegations of the complaint sufficiently allege a good cause of action to sustain the jurisdiction sought. *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482.

**Same—Demurrer for Lack of Jurisdiction.**—Where it appears from the complaint in an action brought in the Superior Court that a good cause of action is alleged in the amount cognizable only in the court of the justice of the peace, and recovery cannot be had for the difference in amount necessary to sustain the jurisdiction of the Superior Court, a demurrer should be sustained. *Williams v. Williams*, 188 N. C. 728, 125 S. E. 482.

**A nonresident plaintiff** may maintain action against initial and non-resident carrier, the cause being transitory. *McGovern v. Atlantic Coast Line R. Co.*, 180 N. C. 219, 104 S. E. 534.

**Foreclosure of Mortgages.**—Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the Su-

perior Court has jurisdiction, when the amount secured is for a less sum than two hundred dollars. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

## ART. 6. JUDICIAL DISTRICTS AND TERMS OF COURT

### § 1443. Terms of court.

A superior court shall be held by a judge thereof at the courthouse in each county. The twenty judicial districts of the state shall be composed of the counties designated in this section, and the superior courts in the several counties shall be opened and held in each year at the times herein set forth. Each court shall continue in session one week, and be for the trial of criminal and civil cases, except as otherwise provided, unless the business thereof shall be sooner disposed of. Each county shall have the number of regular weeks of superior court as set out in this section. (1913, cc. 63, 196.)

#### EASTERN DIVISION

*First district.* The first district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Currituck—Eighth Monday after the first Monday in March, for civil cases only; first Monday in March; first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51; Ex. Sess. 1920, c. 23, s. 2.)

Camden—First Monday after the first Monday in March, and the third Monday after the first Monday in September. (1913, c. 196; 1921, c. 105.)

Pasquotank—Ninth Monday before the first Monday in March, to continue for two weeks, for civil cases only; third Monday before the first Monday in March for civil cases only; second Monday after the first Monday in March for criminal and civil business, to continue for one week; fourteenth Monday after the first Monday in March, to continue for two weeks for civil cases only; second Monday before the first Monday of September, to continue for one week for criminal business only; second Monday after the first Monday in September for civil business only; ninth Monday after the first Monday in September, to continue for two weeks for criminal and civil business. (1913, c. 196; Ex. Sess. 1913, c. 51; 1921, c. 105; 1923, c. 232.)

Perquimans—Sixth Monday before the first Monday in March; sixth Monday after the first Monday in March; eighth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51.)

Chowan—Fourth Monday after the first Monday in March; first Monday after the first Monday in September; thirteenth Monday after the first Monday in September. (1913, c. 196.)

Gates—Third Monday after the first Monday in March; fifth



Monday before the first Monday in September; fourteenth Monday after the first Monday in September. (1913, c. 196.)

Dare—Twelfth Monday after the first Monday in March; seventh Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 51.)

Tyrrell—Seventh Monday after the first Monday in March, to continue one week, for the trial of criminal and civil cases; twelfth Monday after the first Monday in September; fifth Monday before the first Monday in March, for two weeks; thirteenth Monday after the first Monday in March, for one week, for the trial of civil cases only; first Monday before the first Monday in September, for one week, for the trial of civil cases only. The courts shall be opened on Tuesday instead of Monday of the terms of courts unless the judge says he will come and open courts on Monday.

Upon the recommendation of the local bar of Tyrrell, the county commissioners may order the August term of the superior court of Tyrrell county to be held or not to be held as they in their judgment think is best. If the commissioners decide not to have said court, their action shall be certified to the judge holding courts of the district at least ten days before the court is scheduled to be held, and the judge shall not hold the court. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 1; Ex. Sess. 1920, c. 23, s. 1; 1921, c. 83; Ex. Sess. 1921, c. 19; 1923, c. 124.)

Hyde—Eleventh Monday after the first Monday in March; sixth Monday after the first Monday in September. (1913, c. 196.)

Beaufort—Seventh Monday before the first Monday in March, for criminal cases only; second Monday before the first Monday in March, to continue for two weeks, for civil cases only; fifth Monday after the first Monday in March, for civil cases only; ninth Monday after the first Monday in March, to continue for two weeks, for civil cases only; sixth Monday before the first Monday in September, for criminal cases only; fourth Monday after the first Monday in September, to continue for two weeks, for civil cases only; eleventh Monday after the first Monday in September; fifteenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 51; 1919, c. 128, ss. 3, 4.)

*Second district.* The second district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Washington—Eighth Monday before the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; seventh Monday after the first Monday in September. (1913, cc. 63, 196; Ex. Sess. 1913, c. 51; 1919, c. 128, s. 2; c. 133; 1923, c. 227.)

Martin—Second Monday after the first Monday in March, to continue for two weeks; fifteenth Monday after the first Monday in March; second Monday after the first Monday in September, to con-

tinue for two weeks; fourteenth Monday after the first Monday in September. (1913, c. 196; 1919, c. 133; 1924, c. 12.)

Edgecombe—Sixth Monday before the first Monday in March; first Monday in March; fourth Monday after the first Monday in March, to continue for two weeks, for civil cases only; thirteenth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September; seventh Monday after the first Monday in September; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only.

The grand jury drawn by the commissioners of Edgecombe county for the term of court beginning on the sixth Monday before the first Monday in March of each year shall also serve as the grand jury for the term beginning on the first Monday in March and on the thirteenth Monday after the first Monday in March, and shall be charged with the same duties and clothed with the same power at each of said terms and shall receive for each term such mileage and compensation as now provided by law. (1913, c. 196; Ex. Sess. 1913, c. 17; 1915, c. 107; 1917, c. 12; 1919, c. 133; Ex. Sess. 1921, c. 108, s. 1; 1923, c. 246.)

Nash—Fifth Monday before the first Monday in March; second Monday before the first Monday in March, to continue for two weeks, for civil cases only; first Monday after the first Monday in March; seventh Monday after the first Monday in March, to continue for two weeks, for civil cases only; twelfth Monday after the first Monday in March; second Monday [before] the first Monday in September, to continue for [one] week, the first weeks for criminal cases only, and the second week for civil cases only; fifth Monday after the first Monday in September, for civil cases only; twelfth Monday after the first Monday in September, to continue for two weeks, the first week for criminal cases, and the second week for civil cases only. (1913, c. 196; 1915, c. 63; 1919, c. 133; Ex. Sess. 1921, c. 108; 1923, c. 237; 1924, c. 46.)

Wilson—Fourth Monday before the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; tenth Monday after the first Monday in March, to continue for two weeks, the first week for criminal cases only, and the second week for civil cases only; sixteenth Monday after the first Monday in March, for civil cases only; first Monday in September; fourth Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, for civil cases only; fifteenth Monday after the first Monday in September. (1913, c. 196; 1915, c. 45; 1917, c. 12; 1919, c. 133; 1921, c. 10.)

*Third district.* The third district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

[Hertford—First Monday before the first Monday in March;



sixth Monday after the first Monday in March, to continue for two weeks; last Monday in July, for the trial of criminal cases only, and such other cases; proceedings and motions not requiring a jury trial; sixth Monday after the first Monday in September, to continue for two weeks; fourteenth Monday after first Monday in September, to continue for two weeks for trial of civil cases only.] (1913, c. 196; 1915, c. 282; 1919, c. 142; 1923, c. 113; 1924, c. 9.)

Bertie—Third Monday before the first Monday in March, to continue for two weeks; eighth Monday after the first Monday in March, to continue for three weeks, the first week being for the trial of civil cases only; first Monday before the first Monday in September, to continue for three weeks, the last week for the trial of civil cases only; tenth Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 16; 1915, c. 78; 1917, c. 226; Ex. Sess. 1921, c. 45; 1923, c. 185.)

Northampton—Fourth Monday after the first Monday in March; eighth Monday after the first Monday in September, each to continue two weeks; first Monday in August, for civil actions only, except jail cases on the criminal docket. (1913, c. 196.)

["Halifax—Fifth Monday before first Monday in March, to continue for two weeks; second Monday after first Monday in March, to continue for two weeks, for civil cases only; eighth Monday after first Monday in March, for the trial of criminal cases only, and to last for one week and for this term of court the governor is hereby directed to appoint a judge to hold the same from among the regular or emergency judges; thirteenth Monday after first Monday in March, to last two weeks, for the trial of civil and criminal cases; third Monday before first Monday in September, to last for two weeks, for the trial of civil and criminal cases; fourth Monday after first Monday in September, to continue for two weeks, for the trial of civil cases only, and for this term of court the Governor is hereby directed to appoint a judge to hold the same from among the regular or emergency judges; twelfth Monday after first Monday in September, for the trial of civil and criminal cases, and to last for two weeks."] (1913, c. 196; Ex. Sess. 1913, c. 2; 1915, c. 78; 1924, c. 87; 1925, c. 36.)

Warren—Seventh Monday before the first Monday in March; eleventh Monday after the first Monday in March; second Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1917, c. 256.)

["Vance—Eighth Monday before the first Monday in March for criminal cases only; first Monday in March for jail and civil cases only; sixteenth Monday after the first Monday in March for civil cases only; fourth Monday after the first Monday in September for criminal cases only; fifth Monday after first Monday in September for civil cases only, each to continue one week, at any criminal term of court civil cases may be tried by consent."] (1913, c. 196; 1917, c. 256; 1925, c. 66; 1925, c. 165.)

*Fourth district.* The fourth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Wayne—Sixth Monday before the first Monday in March; twelfth Monday after the first Monday in March; second Monday before the first Monday in September; twelfth Monday after the first Monday in September, each to continue for two weeks; fifth Monday after the first Monday in March, and fifth Monday after the first Monday in September, each to continue for two weeks, for civil cases only. (1913, c. 196.)

Johnston—First Monday after the first Monday in March; third Monday before the first Monday in September, for criminal cases only; fourteenth Monday after the first Monday in September, to continue for two weeks; second Monday before the first Monday in March; seventh Monday after the first Monday in March, and third Monday after the first Monday in September, each to continue for two weeks; and the last three terms for civil cases only. (1913, c. 196.)

Harnett—Eighth Monday before the first Monday in March; fourth Monday before the first Monday in March, to continue for two weeks, for civil cases only. Eleventh Monday after the first Monday in March; first Monday in September, to continue for two weeks, the second week for civil cases only. Tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only. (1913, c. 196.)

Chatham—Seventh Monday before the first Monday in March; tenth Monday after the first Monday in March; seventh Monday after the first Monday in September; second Monday after the first Monday in March, for civil cases only; fifth Monday before the first Monday in September for two weeks, for civil and criminal cases, the criminal docket to be called the first day of the term and the trial of criminal cases to continue until the criminal docket is disposed of. (1913, c. 196; 1917, c. 228; 1919, c. 35.)

Lee—Third Monday after the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March; second Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September, to continue for two weeks, the first week for criminal and civil cases and the second for civil cases only; seventh Monday before the first Monday in September, to continue for two weeks. When any party has been duly served with summons and a copy of the complaint thirty days before the commencement of any term of the court of Lee county, the case shall stand for trial at said term. (1913, c. 196; Ex. Sess. 1913, c. 24; 1917, c. 228.)

*Fifth district.* The fifth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Pitt—Seventh Monday before the first Monday in March, for civil



cases only; sixth Monday before the first Monday in March; second Monday before the first Monday in March, for civil cases only; second Monday after the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March and seventh Monday after the first Monday in March, to constitute one term for the trial of criminal and civil cases; eleventh Monday after the first Monday in March, for civil cases only; twelfth Monday after the first Monday in March, for civil cases only; second Monday before the first Monday in September, for civil cases only; first Monday before the first Monday in September; first Monday after the first Monday in September, for civil cases only; third Monday after the first Monday in September, for civil cases only; eighth Monday after the first Monday in September, for civil cases only; tenth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 25; 1915, cc. 111, 139; 1917, c. 217; 1919, c. 56; Ex. Sess. 1920, c. 29; 1921, c. 159.)

Craven—Eighth Monday before the first Monday in March; thirteenth Monday after the first Monday in March, and the first Monday in September for criminal cases only; fifth Monday after the first Monday in March, for civil cases and jail cases on the criminal docket; fourth Monday before the first Monday in March; fourth Monday after the first Monday in September; eleventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only; tenth Monday after the first Monday in March, for civil cases only. (1913, c. 196; 1915, c. 111; 1917, c. 217.)

Pamlico—Eighth Monday after the first Monday in March, and ninth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1921, c. 159.)

Jones—Fourth Monday after the first Monday in March; and second Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 19; P. L. 1915, c. 363; 1921, c. 159.)

Carteret—Fourteenth Monday after the first Monday in March, to continue for two weeks, first Monday after the first Monday in March, and sixth Monday after the first Monday in September; thirteenth Monday after the first Monday in September, for civil cases only; fifth Monday before the first Monday in March. (1913, c. 196; 1921, c. 159.)

Greene—First Monday before the first Monday in March, to continue for two weeks; sixteenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, to continue for two weeks. (1913, cc. 171, 196; Ex. Sess. 1913, cc. 19, 47; 1915, c. 139.)

*Sixth district.* The sixth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Lenoir—Sixth Monday before the first Monday in March; eleventh

Monday after the first Monday in March; second Monday before the first Monday in September, and fourteenth Monday after the first Monday in September, each for criminal cases only. Second Monday before the first Monday in March, two weeks, for civil cases only. Fifth Monday after the first Monday in March; fourteenth Monday after the first Monday in March, and ninth Monday after the first Monday in September, terms of two weeks each for civil cases only. Sixth Monday after the first Monday in September. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; 1917, c. 13.) For civil actions at criminal terms, see end of district.

Duplin—Eighth Monday before the first Monday in March, third Monday after the first Monday in March, first Monday before the first Monday in September, each to continue two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in September, to continue two weeks, the first week for criminal and civil cases, and the second week for civil cases only; fifth Monday before first Monday in March, eighth Monday before the first Monday in September, fourth Monday after the first Monday in September, each for one week, for the trial of criminal cases only. (1913, c. 196; Ex. Sess. 1913, c. 53; 1915, c. 240; Ex. Sess. 1920, c. 81; Ex. Sess. 1921, cc. 78, 79.)

Onslow—Sixth Monday after the first Monday in March, to continue for two weeks for civil cases only; seventh Monday before the first Monday in September, for civil cases only; fifth Monday after the first Monday in September; eleventh Monday after the first Monday in September, and to continue two weeks for the trial of civil cases only; thirteenth Monday after the first Monday in September, for civil cases only; first Monday in March. (1913, c. 196; Ex. Sess. 1913, c. 75; 1915, c. 240; Ex. Sess. 1921, c. 78, s. 1.)

The commissioners of Onslow county, whenever in their discretion the best interests of the county demand it, may, by order, abrogate, in any year, the holding of those terms of the courts of Onslow county which convene on the sixth Monday after the first Monday in March, and the seventh Monday before the first Monday in September, and on the thirteenth Monday after the first Monday in September, all or either of said terms, and when any of these terms are so abrogated, thirty days notice of the same shall be given by the commissioners, in each instance, by publication of same in a newspaper published in the county, and at the courthouse door and at four other public places in the county. (1915, c. 25.)

Sampson—Fourth Monday before the first Monday in March; first Monday after the first Monday in March; fourth Monday before the first Monday in September; first Monday after the first Monday in September; seventh Monday after the first Monday in September; eighth Monday after the first Monday in March, each to continue for two weeks; the September and March terms to be for civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 61; 1915, c. 240; Ex. Sess. 1921, c. 79, s. 2.)



At criminal terms of the superior court in the sixth judicial district, civil actions which do not require a jury may be heard by consent; and at criminal terms in the county of Lenoir, any order, judgment, or decree may be entered in a civil action not requiring a jury trial. (1915, c. 240, s. 3; 1917, c. 13.)

*Seventh district.* The seventh district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Wake—Criminal courts: Eighth Monday before the first Monday in March; fourth Monday before the first Monday in March; first Monday in March; fifth Monday after the first Monday in March; ninth Monday after the first Monday in March; thirteenth Monday after the first Monday in March; eighth Monday before the first Monday in September; first Monday after the first Monday in September; fifth Monday after the first Monday in September; ninth Monday after the first Monday in September; fourteenth Monday after the first Monday in September. These terms shall be for criminal cases only.

Civil courts: Fifth Monday before the first Monday in March; third Monday before the first Monday in March; first Monday after the first Monday in March, to continue for two weeks; third Monday after the first Monday in March, to continue for two weeks; sixth Monday after the first Monday in March, to continue for two weeks; eighth Monday after the first Monday in March; eleventh Monday after the first Monday in March, to continue for two weeks; fourteenth Monday after the first Monday in March, to continue for two weeks; second Monday after the first Monday in September, to continue for two weeks; fourth Monday after the first Monday in September; seventh Monday after the first Monday in September, to continue for two weeks; twelfth Monday after the first Monday in September, to continue for two weeks. These terms shall be for civil cases only, and no criminal process shall be returnable to such terms. [Provided, that the term beginning on the second Monday after the first Monday in September shall be a mixed term for the trial of both civil and criminal cases, and that the term for trial of criminal cases beginning on the fourteenth Monday after the first Monday in September shall continue for two weeks.] (1913, c. 196; 1917, c. 116; 1919, c. 113; 1924, c. 77.)

Franklin—Seventh Monday before the first Monday in March, to continue for two weeks; second Monday before the first Monday in March, to continue for two weeks, for civil cases only; tenth Monday after the first Monday in March; first Monday before the first Monday in September, to continue for two weeks, for civil cases only; sixth Monday after the first Monday in September, for criminal cases only; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases only. (1913, c. 196; 1917, c. 116.)

*Eighth district.* The eighth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

New Hanover—Seventh Monday before the first Monday in March, to continue one week, for the trial of criminal cases only; fourth Monday before the first Monday in March, to continue two weeks, for the trial of civil cases only; first Monday in March, to continue two weeks, for the trial of civil cases only; second Monday after the first Monday in March, to continue one week for the trial of criminal cases only; sixth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; tenth Monday after the first Monday in March, to continue one week, for the trial of criminal cases only; twelfth Monday after the first Monday in March, to continue two weeks, for the trial of civil cases only; fourteenth Monday after the first Monday in March, to continue one week, for the trial of criminal cases only; first Monday after the first Monday in September, to continue one week, for the trial of criminal cases only; second Monday after the first Monday in September, to continue one week, for the trial of civil cases only; sixth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; tenth Monday after the first Monday in September, to continue one week, for the trial of criminal cases only; thirteenth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; sixth Monday before the first Monday in September, to continue one week, for the trial of criminal cases only. (1913, c. 196; 1915, c. 60; 1919, c. 167; 1921, c. 14.)

Pender—Third Monday after the first Monday in September, to continue one week, for the trial of civil and criminal cases; eighth Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; sixth Monday before the first Monday in March, to continue one week, for the trial of criminal and civil cases; third Monday after the first Monday in March, to continue two weeks, for the trial of civil cases only; eleventh Monday after the first Monday in March, to continue one week, for the trial of criminal and civil cases. (1913, c. 196; 1921, c. 14.)

Columbus—Second Monday before the first Monday in September, to continue two weeks, for the trial of criminal and civil cases; eleventh Monday after the first Monday in September, to continue two weeks, for the trial of civil cases only; fifth Monday before the first Monday in March, to continue one week, for the trial of criminal and civil cases; second Monday before the first Monday in March, to continue two weeks, for the trial of civil cases only; eighth Monday after the first Monday in March, to continue two weeks, for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 61; 1917, c. 124; 1921, cc. 14, 149; Ex. Sess. 1921, c. 40.)

Brunswick—First Monday in September, to continue one week, for the trial of civil cases only; fourth Monday after the first Mon-



day in September, to continue one week, for the trial of criminal and civil cases; eighth Monday before the first Monday in March, to continue one week, for the trial of civil cases only; fifth Monday after the first Monday in March, to continue one week, for the trial of criminal and civil cases; fifteenth Monday after the first Monday in March, to continue one week, for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 56; 1917, c. 18; 1921, c. 14.)

All motions and orders, applications for injunctions, receiverships, etc., may be heard at criminal terms upon five days notice. Divorce cases may be tried at any term of court, civil or criminal. (1921, c. 14.)

*Ninth district.* The ninth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Bladen—Eighth Monday before the first Monday in March, for civil cases only; the seventh Monday after the first Monday in March and the sixth Monday after the first Monday in September, for civil cases only; the first Monday after the first Monday in March and the fourth Monday before the first Monday in September, for criminal cases only.

The presiding judge at any term of the superior court of Bladen county may, in his discretion, on the first day of the term, direct the sheriff of the county to summon such additional jurors for the term as may be necessary for the proper dispatch of the business before the court. (1913, c. 196; 1915, c. 110.)

Cumberland—Seventh Monday before the first Monday in March; twelfth Monday after the first Monday in March; first Monday before the first Monday in September; eleventh Monday after the first Monday in September, each for criminal cases only. Third Monday before the first Monday in March; second Monday after the first Monday in March; eighth Monday after the first Monday in March; second Monday after the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only. At all criminal terms of said court civil trials which do not require a jury may be heard by consent of the parties, and motions may be heard upon ten days notice to the adverse party prior to said term. (1913, c. 196; Ex. Sess. 1913, c. 23.)

Hoke—Sixth Monday before the first Monday in March; sixth Monday after the first Monday in March; third Monday before the first Monday in September, to continue for two weeks; and tenth Monday after the first Monday in September. (1913, c. 196; 1917, c. 233; Ex. Sess. 1921, c. 81.)

Robeson—Fifth Monday before the first Monday in March, for criminal cases; eighth Monday before the first Monday in September, to continue for two weeks, for the trial of criminal cases, with the power, hereby given, to the commissioners of Robeson county to determine at their meeting on the first Monday in June of each

year whether the said term shall continue for more than one week; ninth Monday after the first Monday in September, for criminal cases. Fourth Monday before the first Monday in March; first Monday before the first Monday in March, two weeks, for civil cases only; fourth Monday after the first Monday in March, two weeks; tenth Monday after the first Monday in March, two weeks; first Monday in September, two weeks; fourth Monday after the first Monday in September, two weeks; thirteenth Monday after the first Monday in September, two weeks; the last four terms for civil cases. (1913, c. 196; 1915, c. 208; 1919, c. 105; 1923, c. 209.)

*Tenth district.* The tenth district shall be composed of the following counties, and the superior courts thereof shall be held in each year at the following times, to-wit:

Alamance—First Monday before the first Monday in March, fifteenth Monday after the first Monday in March, third Monday before the first Monday in September, and the twelfth Monday after the first Monday in September, for the trial of criminal cases; fourth Monday after the first Monday in March, one week; ninth Monday after the first Monday in March, one week; twelfth Monday after the first Monday in March, two weeks; and the first Monday in September, two weeks, each for the trial of civil cases only. (1913, c. 196; 1915, c. 53; 1921, c. 134; Ex. Sess. 1921, c. 36.)

Durham—Second Monday before the first Monday in March, [third Monday after the first Monday in March], eleventh Monday after the first Monday in March, [seventh Monday before the first Monday in September], fifth Monday after the first Monday in September, and the thirteenth Monday after the first Monday in September, each for the trial of criminal cases only; eighth Monday before the first Monday in March, first Monday in March, second Monday after the first Monday in September, eighth Monday after the first Monday in September (each term two weeks), and eighth Monday after the first Monday in March, for the trial of civil cases. (1913, c. 196; 1915, c. 68; Ex. Sess. 1921, c. 36; 1924, c. 39.)

Granville—Fourth Monday before the first Monday in March, fifth Monday after the first Monday in March, tenth Monday after the first Monday in September, each term for two weeks; sixth Monday before the first Monday in September, one week; seventh Monday after the first Monday in September, one week, for civil cases only. (1913, c. 196; 1915, c. 7; Ex. Sess. 1921, c. 36; 1923, c. 131.)

Orange—Tenth Monday after the first Monday in March, fourth Monday after the first Monday in September, for civil cases only; second Monday after the first Monday in March, first Monday before the first Monday in September, fourteenth Monday after the first Monday in September. (1913, c. 196; 1915, cc. 33, 54; 1917, c. 52; Ex. Sess. 1921, c. 36.)



Person—Fifth Monday before the first Monday in March, seventh Monday after the first Monday in March, fourth Monday before the first Monday in September, sixth Monday after the first Monday in September. (1913, c. 196; 1915, c. 54; Ex. Sess. 1921, c. 36.)

#### WESTERN DIVISION

*Eleventh district.* The eleventh district will be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Ashe—Fifth Monday after the first Monday in March, and eighth Monday before the first Monday in September, each to continue for two weeks, the latter for the trial of civil cases only; sixth Monday after the first Monday in September, for the trial of criminal cases only: Provided, that motion and uncontested civil cases may be heard at said term. (1913, c. 196; Ex. Sess. 1913, c. 34; Ex. Sess. 1921, c. 32.)

Alleghany—Ninth Monday after the first Monday in March, and third Monday after the first Monday in September. (1913, c. 196.)

Surry—Seventh Monday after the first Monday in March, and first Monday before the first Monday in September, each to continue for two weeks; fourth Monday before the first Monday in March; sixteenth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; seventh Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 34; Ex. Sess. 1921, c. 9.)

Forsyth—Eighth Monday before the first Monday in March, to continue for two weeks; third Monday before the first Monday in March, to continue for two weeks, for civil cases only; first Monday after the first Monday in March, to continue for two weeks, for civil cases only; third Monday after the first Monday in March, for criminal cases only; eleventh Monday after the first Monday in March, to continue for three weeks, for civil cases only; sixth Monday before the first Monday in September, to continue for two weeks, for criminal cases only; first Monday after the first Monday in September, to continue for two weeks, for civil cases only; fourth Monday after the first Monday in September, to continue for two weeks; ninth Monday after the first Monday in September, to continue for two weeks, for civil cases only; fourteenth Monday after the first Monday in September, for criminal cases only; first Monday before the first Monday of March, to continue for one week; sixteenth Monday after the first Monday of March, to continue for one week; thirteenth Monday after the first Monday of September, to continue for one week. (1913, c. 196; 1917, c. 169; 1919, c. 87. P. L. 1917, c. 375, provides for a criminal calendar for Forsyth; 1923, c. 151.)

Rockingham—Sixth Monday before the first Monday in March, for criminal cases only; fourth Monday before the first Monday in

September, to continue for two weeks, for criminal cases only. First Monday before the first Monday in March; fifteenth Monday after the first Monday in March; and eleventh Monday after the first Monday in September, each to continue for two weeks, for civil cases only. Tenth Monday after the first Monday in March. (1913, c. 196; Ex. Sess. 1913, c. 49; 1917, c. 107. P. L. 1915, c. 60, provides for a calendar in Rockingham county.)

Caswell—Fourth Monday after the first Monday in March; second Monday before the first Monday in September, and thirteenth Monday after the first Monday in September.

The commissioners of Caswell county, whenever in their discretion the best interests of the county demand, may, by order, abrogate in any year the holding of that term of court which convenes on the second Monday before the first Monday in September; and when the term is so abrogated, thirty days notice of the same shall be given by the commissioners by publication in some newspaper published in Caswell county and at the courthouse door and four other public places in the county. (1913, c. 196; 1919, c. 289.)

*Twelfth district.* The twelfth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Guilford—Sixth Monday before the first Monday in March, one week; first Monday in March, two weeks, eighth Monday after the first Monday in March, one week; fifteenth Monday after the first Monday in March, one week; fifth Monday before the first Monday in September, one week; second Monday after the first Monday in September, two weeks; tenth Monday after the first Monday in September, one week; fifteenth Monday after the first Monday in September, one week, for the trial of criminal cases only.

Eighth Monday before the first Monday in March, two weeks; fourth Monday before the first Monday in March, two weeks; second Monday after the first Monday in March, two weeks; sixth Monday after the first Monday in March, two weeks; tenth Monday after the first Monday in March, two weeks; thirteenth Monday after the first Monday in March, two weeks; fourth Monday before the first Monday in September, two weeks; first Monday before the first Monday in September, two weeks; fourth Monday after the first Monday in September, two weeks, eighth Monday after the first Monday in September, two weeks; thirteenth Monday after the first Monday in September, two weeks, for the trial of civil cases only. (1913, c. 196; 1921, c. 22; 1923, c. 169.)

Davidson—Fifth Monday before the first Monday in March, one week; ninth Monday after the first Monday in March, one week; sixteenth Monday after the first Monday in March, one week; second Monday before the first Monday in September, one week, for the trial of criminal cases only.

Second Monday before the first Monday in March, two weeks;



twelfth Monday after the first Monday in March, one week; seventh Monday before the first Monday in September, two weeks; first Monday after the first Monday in September, one week; eleventh Monday after the first Monday in September, two weeks mixed; for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 14; 1921, c. 42; c. 169.)

Stokes—Fourth Monday after the first Monday in March, one week; sixth Monday after the first Monday in September, one week, for the trial of criminal cases only.

Fifth Monday after the first Monday in March, one week; eighth Monday before the first Monday in September, one week; seventh Monday after the first Monday in September, one week, for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 1; 1921, c. 142; 1923, c. 169.)

*Thirteenth district.* The thirteenth district shall be composed of the following counties, and the superior courts shall be held at the following times, to-wit:

Union—Fifth Monday before the first Monday in March, for criminal cases; third Monday after the first Monday in March, for civil cases; fifth Monday before the first Monday in September, for criminal cases. Sixth Monday after the first Monday in September, to continue for two weeks, the second week for civil cases only; second Monday before the first Monday in March, and second Monday before the first Monday in September, each to continue for two weeks; ninth Monday after the first Monday in March; the last three terms for civil cases only.

In the first two terms of court for Union county for the trial of criminal cases, if it shall appear to the clerk of the superior court that the criminal docket will not be sufficient to take up the entire term, he may make or cause to be made a calendar of civil cases as is made at other terms, and such cases shall be tried at such term in the same manner as if it were a civil term.

If it shall appear to the county commissioners for the county of Union, prior to the drawing of a jury or grand jury for any criminal term of court, that there is no prisoner in jail in the county or that the criminal docket at such term is not sufficient to justify the holding of the term, then the clerk is not to make or cause to be made a calendar of civil cases to be tried at said term, and the county commissioners, within their discretion, may not draw a jury or grand jury for such term, and notice shall be given immediately to the judge not to hold said court.

If it shall appear to the board of commissioners of Union county, thirty days before the beginning of the term held the third Monday after the first Monday in March that the condition of the criminal docket, and the number of prisoners in jail, make it necessary that said March term should be used as a criminal term, then said board of commissioners are hereby authorized and empowered within their

discretion to draw a grand jury for said term, and to give thirty days notice in some local paper that criminal cases would be tried at said term, and all criminal process and undertakings returnable to a subsequent term shall be returnable to said March term. (1913, c. 196; Ex. Sess. 1913, c. 22; 1915, c. 72; 1917, cc. 28, 117; 1921, c. 55.)

Anson—Seventh Monday before the first Monday in March, for criminal cases only; first Monday in March for civil cases only; sixth Monday after the first Monday in March to continue for two weeks, the second week to be for civil cases only; fourteenth Monday after the first Monday in March, for civil cases only; first Monday after the first Monday in September, for criminal cases only; third Monday after the first Monday in September, for civil cases only; tenth Monday after the first Monday in September, for civil cases only. (1913, c. 196; Ex. Sess. 1921, c. 16; 1923, c. 112.)

Scotland—First Monday after the first Monday in March, for one week for the trial of civil cases only; eighth Monday after the first Monday in March for one week for the trial of criminal and civil cases; thirteenth Monday after the first Monday in March for one week for the trial of criminal and civil cases; eighth Monday after the first Monday in September for one week for the trial of civil cases only; twelfth Monday after [first] Monday in September for two weeks for the trial of criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 22; 1917, c. 105; 1923, c. 178.)

Moore—Sixth Monday before the first Monday in March, for criminal cases only; third Monday before the first Monday in March, for civil cases only; eleventh Monday after the first Monday in March, for civil cases only; third Monday before the first Monday in September, for criminal cases only; second Monday after the first Monday in September, for civil cases only; fourteenth Monday after the first Monday in September, for civil cases only. Each of the terms designated for the trial of criminal cases shall also be a return term for such civil process as may be returnable at term, and for the hearing of motions in civil cases; and civil cases requiring a jury may, by consent of parties thereto, be tried at such terms. (1913, c. 196; Ex. Sess. 1913, c. 30; 1915, c. 64.)

Richmond—[Eighth] Monday before the first Monday in March; fifth Monday after the first Monday in March, sixth Monday before the first Monday in September, fourth Monday after the first Monday in September, all for criminal cases; [ninth] Monday before the first Monday in March, one week; second Monday after the first Monday in March, twelfth Monday after the first Monday in March, fifteenth Monday after the first Monday in March, seventh Monday before the first Monday in September, first Monday in September, ninth Monday after the first Monday in September, all for civil cases. (1913, c. 196; 1915, c. 72; 1917, s. 117; 1919, c. 98; 1921, c. 77; Ex. Sess. 1921, c. 16; 1923, cc. 112, 184; 1925, c. 241.)

Stanly—Fourth Monday before the first Monday in March, for civil cases only; fourth Monday after the first Monday in March;



tenth Monday after the first Monday in March, for civil cases only; eighth Monday before the first Monday in September; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September. (1913, c. 196.)

*Fourteenth district.* The fourteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Gaston—Seventh Monday before the first Monday in March; sixth Monday after the first Monday in March; thirteenth Monday after the first Monday in March; second Monday before the first Monday in September; seventh Monday after the first Monday in September; each for the trial of criminal cases exclusively; sixth Monday before the first Monday in March; second Monday after the first Monday in March; second Monday after the first Monday in September; thirteenth Monday after the first Monday in September; each to continue for two weeks, for the trial of civil cases exclusively; third Monday before the first Monday in September for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 12; 1915, c. 153; 1919, c. 187; Ex. Sess. 1920, c. 39; 1925, c. 237.)

Mecklenburg—Eighth Monday before the first Monday in March; first Monday before the first Monday in March; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in March; eighth Monday before the first Monday in September, which last named term only is to continue two weeks; first Monday before the first Monday in September; fourth Monday after the first Monday in September; tenth Monday after the first Monday in September, which eight terms are for the trial of criminal cases exclusively; fourth Monday before the first Monday in March, to continue three weeks; the first Monday in March; fourth Monday after the first Monday in March; eighth Monday after the first Monday in March; eleventh Monday after the first Monday in March; the first Monday in September; fifth Monday after the first Monday in September; eighth Monday after the first Monday in September; eleventh Monday after the first Monday in September, which last named eight terms are to continue for two weeks; fifteenth Monday after the first Monday in March, and all of the last named ten terms are for the trial of civil cases exclusively: Provided, that the board of county commissioners of Mecklenburg county may in their discretion, by order of their regular meeting held on the first Monday in March in any year, provide for the holding of a term of court for the seventh Monday after the first Monday in March, and for the trial of civil and criminal cases, either or both, at said term.

No process nor other writ of any kind pertaining to civil actions shall be made returnable to any of the criminal terms, and no business pertaining to civil actions shall be transacted at the criminal terms for Mecklenburg county. (1913, c. 196; Ex. Sess. 1913, cc. 11, 18; 1915, c. 153; 1919, c. 187; Ex. Sess. 1920, c. 39.)

*Fifteenth District.* The fifteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Iredell—Fifth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday after the first Monday in March, to continue for one week, for civil cases only; eleventh Monday after the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; fifth Monday before the first Monday in September, to continue for two weeks for criminal and civil cases; ninth Monday after the first Monday in September, to continue for two weeks, for criminal and civil cases. (1913, c. 196; 1921, c. 121, s. 2; 1923, c. 129.)

Randolph—Second Monday after the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday after the first Monday in March, for criminal cases; seventh Monday before the first Monday in September, to continue for two weeks for civil cases only; the first Monday in September for criminal cases; thirteenth Monday after the first Monday in September, to continue for two weeks for criminal and civil cases. (1913, c. 196; Ex. Sess. 1913, c. 31; 1921, c. 121, s. 3; Ex. Sess. 1921, c. 22; 1923, c. 229; 1924, c. 23; 1925, c. 156.)

Rowan—Third Monday before the first Monday in March, to continue for two weeks; first Monday in March, to continue for one week, for civil cases only; ninth Monday after the first Monday in March, to continue for two weeks; first Monday after the first Monday in September, to continue for two weeks; fifth Monday after the first Monday in September, for civil cases only; eleventh Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 5; 1921, c. 31.)

Cabarrus—Eighth Monday before the first Monday in March, to continue for two weeks, for the trial of criminal and civil cases; first Monday before the first Monday in March, to continue for one week, for civil cases only; seventh Monday after the first Monday in March, to continue for two weeks, for criminal and civil cases; third Monday before the first Monday in September, to continue for three weeks, for criminal and civil cases; sixth Monday after the first Monday in September, to continue for two weeks, for criminal and civil cases. (1913, c. 196; c. 121, s. 2.)

Montgomery—Sixth Monday before the first Monday in March, for criminal cases: Provided, said term shall be a return term for such civil process as may be returnable at term, and for hearing motions on the civil docket, and civil cases requiring a jury may also be tried at said term by consent of the parties thereto. Fifth Monday after the first Monday in March, to continue for two weeks, for civil cases only. Eighth Monday before the first Monday in September; third Monday after the first Monday in September, for civil cases; fourth Monday after the first Monday in September. (1913,



c. 196; Ex. Sess. 1913, c. 61; 1915, c. 183; 1917, c. 122; 1921, c. 121, s. 3.)

*Sixteenth district.* The sixteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cleveland—Third Monday after the first Monday in March; sixth Monday before the first Monday in September; eighth Monday after the first Monday in September; each to continue for two weeks. (1913, c. 196; 1915, c. 173; 1917, c. 245.)

Lincoln—[Sixth Monday before the first Monday in March to continue for two weeks, the second week for civil cases only]; seventh Monday before the first Monday in September; sixth Monday after the first Monday in September; the last term to continue for two weeks, the second week for civil cases only. (1913, c. 196; 1915, c. 210; 1925, c. 25.)

Burke—First Monday after the first Monday in March, and fourth Monday before the first Monday in September, each to continue for two weeks; fourth Monday after the first Monday in September, to continue for two weeks, for civil cases only; fourteenth Monday after the first Monday in September, to continue for two weeks, the second week for the trial of civil cases only. (1913, c. 196; 1915, c. 67; Ex. Sess. 1920, c. 5; Ex. Sess. 1921, c. 90, s. 3.)

Caldwell—First Monday before the first Monday in March; second Monday before the first Monday in September, each to continue two weeks; eleventh Monday after the first Monday in March, to continue two weeks, for civil cases only; twelfth Monday after the first Monday in September, to continue two weeks, for the trial of civil and criminal cases. (1923, c. 196; 1915, c. 35; Ex. Sess. 1921, c. 90, s. 2.)

Catawba—[Seventh Monday before the first Monday in March, to continue for two weeks and for the trial of civil cases only], fourth Monday before the first Monday in March, to continue for two weeks, ninth Monday after the first Monday in March, to continue for two weeks, for the trial of civil cases only; ninth Monday before the first Monday in September, to continue for two weeks; first Monday in September, to continue for two weeks, for the trial of civil cases only; tenth Monday after the first Monday in September, to continue for one week, for the trial of criminal cases only; [thirteenth Monday after the first Monday in September to continue for one week and for the trial of civil cases only]. (1913, c. 196; Ex. Sess. 1913, c. 7; Ex. Sess. 1921, c. 47, c. 90, s. 1; 1923, c. 18; 1925, c. 13, ss. 1, 2.)

*Seventeenth district.* The seventeenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Alexander—Second Monday before the first Monday in March;

second Monday after the first Monday in September, to continue for two weeks. (1913, c. 196; 1921, c. 166.)

[Yadkin—First Monday before the first Monday in March; second Monday before the first Monday in September, each for the trial of criminal cases only; tenth Monday after the first Monday in March; fourteenth Monday after the first Monday in September, the last two terms each to continue for two weeks for the trial of civil cases only.] (1913, c. 196; Ex. Sess. 1920, c. 42; 1921, c. 166; 1925, c. 65.)

Wilkes—First Monday in March; fourth Monday before the first Monday in September, each to continue for two weeks; first Monday after the fourth Monday in May; and fourth Monday after the first Monday in September, each to continue for two weeks, the last two terms for civil cases only. (1913, c. 196; 1919, c. 165; 1921, c. 166.)

Davie—Second Monday after the first Monday in March; fourth Monday in May, for civil cases only; first Monday before the first Monday in September; and thirteenth Monday after the first Monday in September, last term for civil cases only. (1916, c. 196; 1921, cc. 31, 121, 166.)

Watauga—Third Monday after the first Monday in March; first Monday in September, each to continue for two weeks. (1913, c. 196; 1921, c. 166.)

Mitchell—Fifth Monday after the first Monday in March, two weeks; sixth Monday before the first Monday in September, one week for civil cases only; tenth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1921, c. 166; Ex. Sess. 1921, c. 33.)

Avery—Seventh Monday after the first Monday in March, for two weeks; ninth Monday before first Monday in September, three weeks, for civil cases only; sixth Monday after the first Monday in September, for two weeks. (1913, c. 196; c. 169; 1921, c. 166; Ex. Sess. 1921, c. 33; 1923, c. 90.)

*Eighteenth district.* The eighteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

[Transylvania—Fifth Monday before the first Monday in March to continue for one week for criminal cases only; fifth Monday after the first Monday in March to continue for two weeks; sixth Monday before the first Monday in September to continue for two weeks for civil business only; thirteenth Monday after the first Monday in September to continue for two weeks.] 1913, c. 196; 1915, c. 66; Ex. Sess. 1920, c. 19; Ex. Sess. 1921, c. 24; 1925, c. 63.)

Henderson—First Monday in March, to continue for two weeks; fourth Monday after the first Monday in September, to continue for two weeks; twelfth Monday after the first Monday in March, to continue for two weeks, for civil cases only; tenth Monday after the first Monday in September, to continue for two weeks, for civil cases



only; eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only. (1913, c. 196; 1917, c. 115; 1919, c. 162; Ex. Sess. 1921, c. 24; 1923, c. 204.)

Rutherford—Tenth Monday after the first Monday in March, and eighth Monday after the first Monday in September, each to continue for two weeks; fourth Monday before the first Monday in March, and second Monday before the first Monday in September, each to continue for two weeks for civil cases only. (1913, c. 196; 1915, c. 116; Ex. Sess. 1921, c. 24.)

McDowell—Second Monday before the first Monday in March, eighth Monday before the first Monday in September, second Monday after the first Monday in September, each to continue for two weeks; fourteenth Monday after the first Monday in March, to continue for two weeks, for civil cases only. (1913, c. 196; Ex. Sess. 1921, c. 24; 1923, c. 219.)

Yancey—Third Monday after the first Monday in March, sixth Monday after the first Monday in September, each to continue for two weeks; first Monday in August, to continue for two weeks for the trial of civil cases only. (1913, c. 196; Ex. Sess. 1913, c. 38; 1915, c. 71; Ex. Sess. 1920, c. 4; Ex. Sess. 1921, c. 24; 1923, c. 222.)

Polk—Seventh Monday after the first Monday in March, and first Monday in September, each to continue for two weeks. (1913, c. 196; Ex. Sess. 1921, c. 24.)

*Nineteenth district.* The nineteenth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Buncombs—The second Monday in January, the first Monday in February, the first Monday in March, the first Monday in April, the first Monday in May, the first Monday in June, the second Monday in July, the first Monday in August, the first Monday in September, the first Monday in October, the first Monday in November, and the first Monday in December, each to continue for two weeks, for the trial of civil cases exclusively, the fourth Monday in January, the third Monday in February, the third Monday in March, the third Monday in April, the third Monday in May, the fourth Monday in July, the third Monday in August, the third Monday in September, the third Monday in October, the third Monday in November, and the third Monday in December, each to continue for one week, for the trial of both criminal and civil cases; the third Monday in June, to continue for two weeks, for the trial of both criminal and civil cases. (1913, c. 196; 1915, c. 117; 1917, c. 79; 1923, c. 31.)

Madison—The fourth Monday in February, the fourth Monday in March, the fourth Monday in April, the fourth Monday in May, the fourth Monday in August, the fourth Monday in September, the fourth Monday in October, the fourth Monday in November. (1913, c. 196; 1915, c. 117; 1917, c. 79.)

*Twentieth district.* The twentieth district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

Cherokee—Sixth Monday before the first Monday in March [for civil cases only], fourth Monday after the first Monday in March; fifteenth Monday after the first Monday in March, for the trial of civil causes only: Provided, that upon request of the bar of Cherokee county the board of county commissioners need not draw a jury for this term; fourth Monday before the first Monday in September; ninth Monday after the first Monday in September, each to continue two weeks. (1913, c. 196; Ex. Sess. 1913, c. 21; 1917, c. 114; 1923, c. 51; 1925, c. 30.)

Graham—Second Monday after the first Monday in March; thirteenth Monday after the first Monday in March, to be held for civil cases only; first Monday in September, each to continue for two weeks. (1913, c. 196; Ex. Sess. 1913, c. 28; 1917, c. 54.)

Swain—First Monday in March; sixth Monday before the first Monday in September; seventh Monday after the first Monday in September, each to continue for two weeks: *Provided*, that the board of commissioners of Swain county may, when the public interest requires it, decline to draw a grand jury for the July term. (1913, c. 196.)

Haywood—Eighth Monday before the first Monday in March, to continue for two weeks, for civil cases only; fourth Monday before the first Monday in March, to continue for two weeks; ninth Monday after the first Monday in March, to continue for two weeks, for civil cases only; eighth Monday before the first Monday in September, to continue for two weeks; second Monday after the first Monday in September, [for civil cases only] and the twelfth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196; 1917, cc. 7, 114; 1923, c. 35, s. 2; 1924, c. 27.)

Jackson—Second Monday before the first Monday in March; eleventh Monday after the first Monday in March, for civil cases only; fifth Monday after the first Monday in September, each to continue for two weeks. (1913, c. 196.)

Macon—Seventh Monday after the first Monday in March; second Monday before the first Monday in September, and eleventh Monday after the first Monday in September, the first two of said terms to continue for two weeks, and the last thereof for one week only. The board of commissioners of Macon county may, for good cause, decline to draw a jury for more than one week for any term of court provided for in this chapter. (1913, c. 196; 1923, c. 35, s. 1.)

Clay—Sixth Monday after the first Monday in March, and fourth Monday after the first Monday in September. (1913, c. 196.)

**Session at Scene of Crime.**—Where at the requests of defendants, a view of the scene of a crime is granted and a short session of the court



held there, no prejudicial error is committed under this section. *State v. Stewart*, 189 N. C. 340, 127 S. E. 260.

### § 1444. Civil cases at criminal terms.

**Failure to Give Notice.**—It is required by the provisions of this section that due notice be given of motions in civil action to be heard at a criminal term of court, and where the movant has failed to give the statutory notice of his motion, and the Superior Court has ordered a dismissal of the action, the judgment will be reversed on appeal. *Dawkins v. Phillips*, 185 N. C. 608, 116 S. E. 723.

## ART. 7. SPECIAL TERMS OF COURT

### § 1450. Governor may order special terms.

Whenever it shall appear to the governor by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county as to require the holding of a special term for its dispatch, he shall issue an order to the judge of the judicial district in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the court of his district, and hold for such time as he may designate, unless the business be earlier disposed of. [The Governor may order a special term of court to be held in any county or district during the holding of a regular term of the Superior Court in such county or district, either by a judge of the Superior Court or by any emergency judge if the dispatch of business requires it.] (Rev., s. 1512; Code, s. 914, R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Ex. Sess. 1924, c. 100.)

## Subchapter IIA. Judicial Conference

### ART. 8(A) JUDICIAL CONFERENCE

#### § 1461 (a). Creation; object.

There shall be created a judicial conference for the continuous study of the organization, rules and methods of practice and procedure of the judicial system of the State of North Carolina, and the practical working and results produced by the system. (1925, c. 244, s. 1.)

#### § 1461 (b). Organization.

The conference shall be composed of the judges of the Supreme and Superior courts, the Attorney-General and one practicing attorney at law from each judicial district to be appointed by the Governor for a term of two years. Any vacancy in the judicial conference among the practicing attorneys caused by death, resignation or otherwise shall be filled by the Governor. The chief justice of the Supreme Court shall be the president of the conference, and the

clerk of the Supreme Court shall be secretary of the conference. (1925, c. 244, s. 2.)

### **§ 1461 (c). Reports and recommendations by and to the conference.**

The conference shall report annually to the Governor the work of the various parts and branches of the judicial system, with its recommendations as to any changes or reforms in the system and in the practice and procedure of the courts, and the Governor shall transmit the report of the conference biennially to the General Assembly with such recommendations as he may deem advisable. The conference may also from time to time submit such suggestions and recommendations as it may deem advisable for the constitution of the judges of the various courts with relation to rules of practice and procedure. The clerks of the various courts and other officials shall make to the conference such reports on such matters and in such form, periodically or from time to time, as the conference may prescribe. (1925, c. 244, s. 3.)

### **§ 1461 (d). Meetings.**

The conference shall meet twice each year at a time and place to be fixed by the president of the conference. The conference may hold public meetings and shall have power to administer oaths and require the attendance of witnesses and the production of books and papers. A quorum for the transaction of business shall consist of not less than two of the justices of the Supreme Court, six judges of the Supreme Court and six of the attorneys at law who are members of the conference. (1925, c. 244, s. 4.)

### **§ 1461 (e). No compensation; expenses.**

No member of the conference shall receive any compensation for his services. The sum of not exceeding two hundred and fifty dollars (\$250) annually is appropriated for actual expenses incurred for clerical help, and incidentals to be paid out of the treasury, upon the order of the president of the conference, approved by the State Auditor. (1925, c. 244, s. 5.)

## **Subchapter III. Justices of the Peace**

### **ART. 10. JURISDICTION**

#### **§ 1473. Jurisdiction in actions on contract.**

See notes to section 1436.

**In General.**—Every action to recover a sum of money due by contract, not in excess of two hundred dollars, etc., is required by this section to be originally brought in the court of a justice of the peace, unless contrary to some other legislative enactment. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

**Distribution of Jurisdiction Question of Procedure.**—The interpretation of the constitution and statutes as to the distribution of jurisdiction among the Superior and inferior courts, and courts of the justices of



the peace, involves no rule of property, but only of procedure. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

**Mere allegation of defendant that title is in controversy** will not oust justices' jurisdiction. The matter must appear from the evidence or admission of the parties. *Hann v. Fletcher* (N. C.), 128 S. E. 326, 328.

**In an action by a purchaser of land with warranty**, to recover a sum of money paid by him to free the land from a lien, the deed will be introduced to prove the covenants, the title to realty will be involved, and a justice would not have jurisdiction. *Hann v. Fletcher* (N. C.), 128 S. E. 328.

**Foreclosure of Mortgage.**—Because of the equity growing out of the relation of mortgagor and mortgagee when the former seeks to have the mortgaged premises foreclosed for the nonpayment of the debt, the Superior Court has jurisdiction, when the amount secured is for a less sum than two hundred dollars. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 141.

**Counterclaims** in excess of the jurisdictional amount of a justice's court may not be recovered in that court, and are allowed to be pleaded only for the purposes of set-off and recoupment, as a bar to the plaintiff's demand. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

**How Equity Administered.**—A court of a justice of the peace cannot affirmatively administer an equity, and may only pass thereon as a matter of defense. *Singer Sewing Machine Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

## § 1474. Jurisdiction in actions not on contract.

**In General.**—The Superior and justices' courts are of concurrent jurisdiction in actions to recover personal property to the value of fifty dollars, and the former has exclusive jurisdiction when the property in controversy exceeds that sum. *Singer Sewing Mach. Co. v. Burger*, 181 N. C. 241, 107 S. E. 14.

## § 1481. Jurisdiction in criminal actions.

**Amendment of Indictment Sufficient for Conviction.**—For effect of amendment of indictment see *State v. McLamb*, 188 N. C. 803, 125 S. E. 530.

# ART. 13. PLEADING AND PRACTICE

## § 1500. Rules of practice.

**Rule 7—Informality or Irregularity.**—Pleadings and proceedings in the trial of a cause should be liberally construed so as to prevent a failure of justice because of mere informality or irregularity, especially when the case is tried before a justice of the peace, where this section expressly provides that the pleadings are not required to be in any particular form and are sufficient when they "enable a person of common understanding to know what is meant." *Wilson v. Batchelor*, 182 N. C. 92, 108 S. E. 355.

The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient under this section if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the Court to amend either in substance or form, at any time before or after judgment in furtherance of justice. *Aman v. Dover, etc., R. Co.*, 179 N. C. 310, 102 S. E. 392.

**Same—Sufficient Notice.**—Where it appears from an entry on appeal from a justice of the peace, that the plaintiff has sued to recover of an employee the amount of an alleged overdraft, and the defendant has pleaded as a counterclaim that, under his contract of employment, he was to receive a large amount in contemplation of an increase in the

business justifying it; and that on the trial the only question presented was whether there should have been an increase in a specific sum which admittedly was sufficient to cover the defendant's demand; and it further appears from an entry made at the trial in the Superior Court on appeal thereto that the defendant admitted plaintiff's claim, but further claimed he was entitled to a credit to the amount of the promised increase of salary, leaving this the only disputed question, it was held that the plaintiff was given sufficiently definite notice of the defendant's claim, and his objection to the insufficiency of the pleadings was untenable. *Wilson v. Batchelor*, 182 N. C. 92, 108 S. E. 355.

**Rule 12—Allowing Amendments.**—In *State v. Mills*, 181 N. C. 350, 533, 106 S. E. 677, the court said: "A clear analysis of this section (which was sec. 908 of the Code) is made by Justice Ashe in *State v. Vaughan*, 91 N. C. 532, showing that the exercise of the power is discretionary, and that the power itself, by gradual amendment of the statute, is very broad and finally was extended to matters of substance, whereas formerly it related only to matters of form and was confined to civil actions."

"The reason for the change in the statute extending the power of amendment, so as to embrace both civil and criminal cases, matters of substance as well as matters of form, and the power to amend before or after judgment, is perfectly obvious. It was because a justice of the peace was supposed to lack technical learning and skill in framing process and pleadings, whereas the lawyer who practiced in the Superior Courts, and the solicitor, were supposed to have both, and also the judge, and no harm could be done to the defendant, or to the opposite party, by making the process or pleading conform, in some degree, to the rules of law. It produced, at least, greater certainty in legal procedure. No party could be prejudiced by it unless there was a departure from the original charge in the warrant." *State v. Mills*, 181 N. C. 530, 533, 106 S. E. 677.

On appeal from a court of a justice of the peace, the Superior Court judge may, under this section, Rule 12, liberally allow amendments in its discretion, to the substance of a criminal complaint, as well as to the form, when so doing does not change the character of the offense originally charged. *State v. Mills*, 181 N. C. 530, 106 S. E. 677.

**Same—Same—In Supreme Court on Appeal.**—Where the indictment in the court of a justice of the peace does not sufficiently allege the failure of the parent or guardian to send the child to another than the public school in the district, as required by C. S., 5758, an amendment may be allowed by the judge of the Superior Court to cure the defect and proceed with the trial; but such amendment may not be allowed in the Supreme Court on appeal over an error committed in the instructions of the trial judge to the jury to the defendant's prejudice. *State v. Johnson*, 188 N. C. 591, 125 S. E. 183.

**Same—Applicable to Final Judgments Only.**—Our statutes requiring a motion for a rehearing before a justice of the peace within ten days, etc., this section rule 12, and 1530, allowing fifteen days for appeal from the justice's judgment, etc., apply to final judgments regularly entered, and not to judgments irregularly taken upon defective service, or void for lack of service of summons on the defendant, or other proper process to bring him before the court. *Graves v. Reidsville*, 182 N. C. 330, 109 S. E. 29.

## ART. 16. APPEAL

### § 1530. Manner of taking appeal.

This section contemplates and applies to causes of which the court has acquired jurisdiction, and does not affect a case which enables one to obtain relief from a judgment entered against him when the court for lack of service was without jurisdiction to make any orders in any



way affecting the rights of person or property. *Graves v. Rudsville*, 182 N. C. 330, 332, 109 S. E. 29.

**Justice of Peace Included.**—The principle both as to the right and procedure for a defendant against whom service of summons has not been made, or the same waived, to have the judgment set aside applies to the courts of justices of the peace as well as to those of more extensive jurisdiction. *Graves v. Reidsville*, 182 N. C. 330, 109 S. E. 29.

**Fraud Only Incidental to Motion.**—The ground upon which a judgment may be set aside on defendant's motion in the cause for lack of proper service is not affected by any element of fraud that may have been alleged to have entered therein; and the justice's court, notwithstanding that it has no jurisdiction where fraud enters into the controversy, may entertain a motion in the cause to set aside its own judgment for the lack of the required service of summons, the question of fraud being but an incident and not the ground upon which the motion was made. *Graves v. Reidsville*, 182 N. C. 330, 109 S. E. 29.

**Applicable to Final Judgments Only.**—See note of *Graves v. Reidsville*, 182 N. C. 330, 109 S. E. 29 under § 1500.

## § 1532. Justice's return on appeal.

See notes to §§ 660, 661.

**Liability of Justice.**—The sending up an appeal to the Superior Court by the justice of the peace upon the payment of the cost is a judicial act, and no action for damages will lie against him for failing to send up the papers in apt time. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353.

## § 1534. Restitution ordered upon reversal of judgment.

**Cumulative Remedies.**—A judgment debtor may stay execution pending appeal by giving the bond required by our statute, (§ 650) or he may pay the debt and preserve his right to prosecute his appeal according to the course and practice of the court, with order for restitution should he succeed therein, unless such payment was made by way of compromise and agreement to settle the controversy, or, under peculiar circumstances, which amounted to a confession of the correctness of the judgment, and a withdrawal of the appeal. *Wachovia Bank, etc., Co. v. Miller*, 184 N. C. 593, 115 S. E. 161.

Where, in the Superior Court, the plaintiff moves to dismiss the appeal of his debtor from a judgment rendered against him in the court of a justice of the peace on the ground that the appeal had been abandoned by the payment of the judgment, the burden is on him to show such acts or conduct as would amount to the abandonment he has alleged in his motion, the giving of a stay bond, or even the payment of the judgment, not, of itself being sufficient to show an abandonment. *Wachovia Bank, etc., Co. v. Miller*, 184 N. C. 593, 115 S. E. 161.

## Subchapter IV. Recorders' Courts

### ART. 18. MUNICIPAL RECORDERS' COURTS

## § 1536. In what cities and towns established; court of record.

In each city and town in the state, which has acquired a population of [one] thousand or over by the last federal census, a recorder's court for such municipality may be established, which shall be a court of record and shall be maintained pursuant to the provisions of this subchapter. (1919, c. 277, ss. 1, 2; 1925, c. 32.)

**Constitutionality.**—Where the question of the constitutionality of this

section establishing recorders' courts by a general act is the subject of the action, and pending the appeal the Legislature has withdrawn the effect or operation of the statute from a certain county (Caldwell) wherein the establishment of the court was the subject of injunctive relief, the cause of action abates and the appeal will be dismissed at the cost of each party, and the order restraining the establishment of the particular court will continue to be effective. *Coffey v. Rader*, 182 N. C. 689, 110 S. E. 106.

### **§ 1537. Recorder's election and qualification; term of office and salary.**

The court shall be presided over by a recorder, who may be a licensed attorney at law, and who shall be of good moral character and, at the time of his appointment or election, a qualified elector of the municipality. The first recorder, upon the establishment of such court, shall be elected by the governing body of the municipality, either at the time of the establishment of the court or within thirty days thereafter, and he shall hold office until the next municipal election and until his successor is duly elected and qualified. If a vacancy occur in the office at any time, the same shall be filled by the election of a successor for the unexpired term by the governing body of the municipality, at the regular or special meeting called for that purpose. After the first elected recorder each succeeding recorder shall be nominated and elected in the municipality in the same manner and at the same time as is now provided by law for the elective officers of the municipality, and in the general election for such officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office, as is now provided by law for a justice of the peace, and shall file the same with the clerk of the board of the city or town. The salary of the recorder shall be determined and fixed in advance by the governing body of the city or town, and shall not be increased or decreased during the term of his office, and shall be paid out of the funds of the municipality; [Provided, that the governing body of such city or town is hereby authorized to provide a schedule of fees to be charged by said recorder; Provided further, that the recorder may also be the mayor of the municipality.] (1919, c. 277, s. 2; 1925, c. 32, s. 2.)

### **§ 1541. Criminal jurisdiction.**

The court shall have the following jurisdiction within the following named territory:

1. Original, exclusive, and concurrent jurisdiction, as the case may be, of all offenses committed within the corporate limits of the municipality which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which the mayor or other municipal court now has jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace



of all offenses committed outside the corporate limits of the municipality and within a radius of [five] miles thereof, which is now or may hereafter be given to justices of the peace under the constitution and general laws of the state.

3. Exclusive, original jurisdiction of all other criminal offenses committed within the corporate limits of such municipality and outside, but within a radius of [five] miles thereof, which are below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors.

4. Concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime committed within the territory above mentioned, of which the recorder's court is not herein given final jurisdiction.

5. All jurisdiction given by the general laws of the state to justices of the peace, or to the superior court, to punish for contempt, to issue writs *ad testificandum*, and other process to require the attendance of witnesses and to enforce the orders and judgments of the courts. (1919, c. 277, s. 4; 1925, c. 32, s. 3.)

### **§ 1542. Jurisdiction to recover penalties.**

The recorder's court shall also have jurisdiction to try all actions for the recovery of penalties imposed by law, or by any ordinance of the municipality in which the court is located, for any offense committed within the corporate limits of the municipality or outside thereof within [five] miles of the corporate limits, and all such penalties shall be recovered in the name of the municipality. (1919, c. 277, s. 10; 1925, c. 32, s. 4.)

### **§ 1551. Clerk of court; election and duties; removal; fees.**

The clerk of the recorder's court shall be elected by the governing body of the city or town at the same time and for the same term as the vice recorder, and all vacancies in the office of the clerk of the court shall be filled in the manner provided for filling vacancies in the office of vice recorder. Before entering upon the duties of his office, the clerk shall enter into a bond, with sufficient surety, in a sum to be fixed by the governing body of the municipality, not to exceed five thousand dollars, payable to the state, conditioned upon the true and faithful performance of his duties as such clerk and for the faithful accounting for and paying over of all money which may come into his hands by virtue of his office. The bond shall be approved by the governing body and shall be filed with the clerk of the superior court of the county. The clerk shall make monthly settlements with the county and city treasurers for all money which has come into his hands belonging to either. The clerk of the governing body of the municipality shall *ex officio* discharge the duties of the clerk of the court, unless the governing body shall elect some other person to discharge the duties. The governing body of the

municipality shall have the right to remove the clerk of the court, either for incapacity or for neglect of the duties of his office; and in case of a vacancy for any cause the office shall be filled in the manner hereinbefore provided. [Provided, that the governing body of the municipality is hereby authorized to provide a schedule of fees to be charged by the clerk of said court.] (1919, c. 277, ss. 15, 18; 1925, c. 32, s. 5.)

#### **§ 1554. Prosecuting attorney; duties and salary.**

There shall be a prosecuting attorney in the court, who shall appear for the prosecution in all cases therein and, when specially requested by the governing body of the municipality and the recorder, shall assist in the prosecution of all cases which may be bound over or appealed from the court to the superior court; for his services he shall be paid such amount per annum as may be fixed by the governing body, at the same time and in the same manner as is provided for fixing the salary of the recorder. The prosecuting attorney may, or may not, perform the duties of city attorney, in the discretion of the governing body of the municipality; [Provided, that the governing body of any such municipality is hereby authorized to provide a schedule of fees to be charged by said prosecuting attorney.] (1919, c. 277, s. 16; 1925, c. 32, s. 6.)

#### **§ 1562 (e). Jurisdiction not to extend to other municipalities.**

No court hereafter established by the governing body of any city or town shall have jurisdiction over the territory within the corporate limits of any other incorporated city or town, or outside the county in which the city or town establishing such court is located: *Provided*, that this act shall not apply to the counties of Robeson, Craven, Nash and Edgecombe. (1925, c. 280.)

### **ART. 19. COUNTY RECORDERS' COURTS**

#### **§ 1564. Recorder's election, qualification, and term of office.**

The court shall be presided over by a recorder, who shall have the same qualifications as provided for recorders of municipalities. The first recorder shall be elected by the board of commissioners of the county, either at the time of the establishment of the court or within thirty days thereafter, and shall hold the office until the next regular election wherein county officers are elected, and until his successor shall be duly elected and qualified; and should a vacancy occur in said office at any time, the same shall be filled by the election of a successor with the qualifications herein provided, for the unexpired term, by the board of county commissioners at a regular or special meeting called for that purpose. The successor of the first recorder herein provided for and each succeeding recorder shall be nominated and elected in the county in the same manner and at the



same time as is now provided by law for the nomination and election of the elective officers of the county and in the general election for such elective officers. Before entering upon the duties of his office the recorder shall take and subscribe an oath of office as is now provided by law for justices of the peace, and shall file the same with the clerk of the superior court of the county, who shall duly record the same in a book kept for that purpose. The recorder's salary shall be fixed in advance by the board of commissioners, and paid out of the county funds upon vouchers, and shall not be increased or decreased during his term. [*Provided*, that the county commissioners of any county wherein has been established, or shall be established, a county recorder's court may provide for the compensation of the judge or solicitor of the said court by salary or fees; and in case the said officers are compensated by fees, the same fees fixed by law for services in like cases in the Superior Court shall be paid; and in the case of solicitors those fees which were in force for services in like cases at the time that the solicitors were put upon a salary basis: *Provided*, that no change be made in the manner of compensating said officers during their term of office. But the part of this section in brackets shall apply to Scotland county only.] (1919, c. 277, s. 25; 1925, c. 171.)

### **§ 1573. Sentence imposed; fines and costs paid.**

Whenever any person shall be convicted or plead guilty of any offense of which the court has final jurisdiction the recorder may sentence him to the common jail of the county in which the court shall be held, and assign him to work on the public roads of the county where provision has been made therefor; but if no provision has been made for working convicts upon the public roads in the county, then the recorder may sentence such person to be worked upon the public roads of any other county within the judicial district [or any county within any adjoining judicial district] which has made such provision: *Provided*, that in case the person so convicted or pleading guilty shall be a woman or an infant of immature years, then the recorder may assign him or her to the county workhouse, reformatory, or other penal institution located in the county; or if there be none, any similar institution that may be located outside of the county to which judges of the superior court are authorized to sentence such person under the general laws of the state. All fines imposed by the court shall be collected by the clerk of such court or the deputy clerk thereof in the same manner as the clerk of the superior court collects fines imposed by the superior court; and, where a defendant is convicted and fails to pay the costs of such conviction, the county shall pay such costs as is allowed by law in similar cases before the superior court. (1919, c. 277, s. 32; 1925, c. 308.)

### **§ 1575. Clerk of superior court ex officio clerk of county recorder's court.**

The clerk of the superior court of any county in which a county

recorder's court shall be established shall be *ex officio* clerk of such court. [Provided that the clerk of the Superior Court of Columbus county shall be paid a salary of twenty-five dollars per month for his services as clerk of Columbus County recorder's court.] He shall keep separate criminal dockets in his office for such court in the same manner as he keeps criminal dockets in the superior court; he shall otherwise possess all the powers and functions conferred upon, and discharge all the duties required of, clerks of the superior court under the general law; and he shall be liable upon his official bond as clerk of the superior court for all of his official acts and conduct in reference thereto. (1919, c. 277, s. 36; 1925, c. 232.)

#### ART. 20. MUNICIPAL-COUNTY COURTS

##### § 1584. Election of recorder.

If the territorial jurisdiction of such municipal recorder's court is extended to the entire county, as set forth in the preceding section, then the first recorder [and the first solicitor] shall be selected for the term, and in the manner hereinbefore set forth, by a joint meeting of the governing body of such municipality and the board of commissioners of the county, and such recorder [and such solicitor] shall be thereafter nominated and elected as is provided for herein for the nomination and election of a county recorder. Such recorder shall be a resident of the municipality, and in all other respects the court shall be conducted under the proceedings herein provided for municipal courts [except as hereinafter provided for; provided that the words of this section in brackets shall apply to Lenoir, Onslow and Sampson counties only]. (1919, c. 277, s. 42; 1925, c. 233, s. 1.)

**Editor's Note.**—For local act adding new sections applicable to Lenoir, Onslow and Sampson counties, see Acts 1925, chapter 233.

#### ART. 23. ELECTIONS TO ESTABLISH RECORDERS' COURTS

##### § 1608. Certain districts and counties not included.

This subchapter shall not apply to the tenth, except as Granville county, fifteenth, except as to Iredell county, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth judicial districts, except as to Cherokee, Jackson, Haywood, and Swain counties, nor to the eleventh district, except to the county of Caswell; nor shall it apply to the counties of Anson, Chatham, Columbus, Halifax, Hyde, Johnston, New Hanover, Polk, Madison, and Robeson. (1919, c. 277, s. 64; 1921, c. 110, s. 16; Ex. Sess. 1921, cc. 59, 80; 1923, cc. 19, 40; 1925, c. 162, s. 1.)

**Editor's Note.**—By the act of 1925, Pitt County was stricken from this section so that the subchapter is now applicable thereto.



## Subchapter V. General County Courts

### ART. 24. ESTABLISHMENT, ORGANIZATION AND JURISDICTION

#### § 1608 (f). Establishment authorized. Official entitlement. Jurisdiction.

In each county of this state there may be established a court of civil and criminal jurisdiction, which shall be a court of record and which shall be maintained pursuant to this subchapter and which court shall be called the general county court and shall have jurisdiction over the entire county in which said court may be established. [In any county in the State in which there are situated two or more cities each of which has or may have in the future a population, according to any enumeration by the United States Census Bureau, of more than twenty thousand inhabitants, the commissioners of such county or counties are authorized hereby to establish general county courts as hereinafter provided without first submitting the question of establishing such court to a vote of the people: *Provided*, that the said enumeration need not be made at a regular decennial census. *Provided further*, that in the event that the portion of this section in brackets is acted upon by the commissioners of any county in establishing a general county court, as is herein provided, the said commissioners may make such provisions for holding such courts in either or all of such cities.] (1923, c. 216, s. 1; 1925, c. 242.)

#### § 1608 (f) 1. Creation by resolution of board of commissioners.

If in the opinion of the board of commissioners of any county, the public interests will be best promoted by so doing, they may establish a general county court under this article, by resolution which shall, in brief, recite the reasons for the establishment thereof, and further recite that, in the opinion of the board of commissioners, it is not necessary that an election be called upon the establishment of such court as herein provided for, and upon the adoption of such resolution the board of commissioners may establish said court without holding such election. (1924, c. 85, s. 24-a.)

#### § 1608 (f) 2. Abolishing the court.

Whenever in the opinion of the board of commissioners of any county in which a court has been established under this article, the conditions prevailing in such county are such as to no longer require the said court, such board of county commissioners may, by proper resolution reciting in brief the reasons therefor, abolish said court: *Provided*, no such court shall be abolished except at the end of the terms of office of the judge and solicitor, unless such judge and solicitor shall voluntarily tender their resignations, setting forth, in brief, that in their opinion the existence of the said court is no longer

necessary, in which event the board of commissioners may forthwith abolish the same. (1924, c. 85, s. 24-b.)

**§ 1608 (f) 3. Transfer of criminal cases.**

Upon the establishment of the general county court, as in this article authorized, the clerk of the Superior Court shall immediately transfer from the Superior Court to such general county court all criminal actions pending in the Superior Court of which the general county court has jurisdiction, as in this act conferred, and the general county court shall immediately proceed to try and dispose of such criminal actions. (1924, c. 85, s. 24-c.)

**§ 1608 (f) 4. Transfer of civil cases.**

The judge of the Superior Court, in term, may transfer to the general county court any action pending in the Superior Court, upon motion, if in his opinion the ends of justice would be best served, such transfer to be upon motion, of which due notice shall be given, and the general county court shall have jurisdiction to try all such civil actions as shall be transferred into it as herein authorized. (1924, c. 85, s. 24-d.)

**§ 1608 (f) 5. Costs.**

Cost in both criminal and civil actions shall be taxed and collected as now provided by law. (1924, c. 85, s. 24-e.)

**§ 1608 (g). Judge; election, term of office, vacancy in office, qualification, salary, office.**

The court shall be presided over by the judge, who may be a licensed attorney at law, and at the time of his election he shall be a qualified elector in the county. The first judge of the court upon the establishment of said court shall be elected by the board of county commissioners within thirty days after the establishment of said court, and he shall hold his office until January first, following the next general election of county officers and until his successor is elected and qualified. If a vacancy occurs in the office of judge of said court, the same shall be filled by the election of a successor for the unexpired term by the board of county commissioners. After the first elected judge by the board of county commissioners, each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office and when other county officers are elected, and shall hold his office for a term of four years beginning January first following his election, and until his successor is elected and qualified. Before entering upon the duties of his office, the judge shall take and subscribe an oath of office, as is now provided by law for justices of the peace, and he shall file the same with the clerk of the superior court of the county. The salary of said judge shall be fixed by the board of commissioners of the county, and (shall not be) decreased during the term of office, and it shall be paid monthly



out of the funds of the county. The judge shall reside in the county and shall be provided by the county commissioners with an office at the county-seat. The terms of said court shall be held in the courthouse, but they shall at no time inconvenience or discommode the superior court of the county while the superior court in term is using the courthouse. [If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such judge, fixing his term of office, in which event the judge so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for.] (1923, c. 216, s. 2; 1924, c. 85, s. 1.)

**Editor's Note.**—The words "shall not be" appearing in parenthesis in this section were inadvertently stricken out by the Act of 1924, when the manifest intention was only to strike out the provisions for a minimum salary.

### **§ 1608 (i). Prosecuting officer; duties, election, salary, etc.**

There shall be a prosecuting attorney of the general county court, to be known officially as prosecutor, who shall appear for the state and prosecute in all criminal cases being tried in said court, and for his services he shall be paid such salary as may be fixed by the board of county commissioners. He shall be elected by the board of county commissioners for the first term as herein provided for the election of the judge, and thereafter by the qualified electors of the county in the same manner as is provided herein for the election of the judge; and vacancies in the office of the prosecutor shall be filled by the board of county commissioners as they are herein authorized to fill vacancies in the office of judge. If requested to do so by the judge, the prosecutor shall represent the county in prosecution of criminal appeals from this court in the superior court. The salary of the prosecutor shall be paid monthly out of the county funds. [If in the opinion of the board of commissioners the best interests of the county will be promoted thereby, the said board may appoint such [solicitor], fixing his term of office, in which event the [solicitor] so appointed shall hold office pursuant to such appointment, and shall not be elected by a vote as herein provided for.] (1923, c. 216, s. 3; 1924, c. 85, s. 1; 1925, c. 250, s. 1.)

### **§ 1608 (k) 1. Fees of clerk and sheriff; local provision.**

In those counties in which the clerk of the Superior Court and sheriff are paid fees, and not salaries, such clerk and sheriff shall receive the same fees for services rendered in the general county as they would have received had such services been rendered in the Superior Court. [The county commissioners of any county wherein a county court has been established may, upon such investigation as may show the same to be proper, and by resolution at any regular meeting, provide that the judges of said court and the solicitors thereof, or either of them, may receive compensation either by way

of salary or fees, as the said board of commissioners may deem best; and in case the said judge or solicitor, or either of them, is compensated for services by fees, the said fees shall be the same as are now established by law, and which are paid in like cases in the Superior Court; and in the case of solicitors those fees which were paid to solicitors of the Superior Court in like cases at the time that the solicitors of the said Superior Court were put on a salary basis: *Provided, however*, that the manner of compensating the said judges and solicitors, either by salary or fees, shall not be changed during their term of office. *Provided further*, that the portion of this section in brackets shall apply to Scotland county only.] (1924, c. 85, s; 1925, c. 172.)

### § 1608 (m). Criminal jurisdiction, extent.

The general county court, herein provided for, shall have the following jurisdiction in criminal actions within the county:

1. Original, exclusive and concurrent jurisdiction, as the case may be, of all offenses within said county which are now or may hereafter be given to justices of the peace under the constitution and general laws of the state, including all offenses of which mayors of towns or other municipal courts now have jurisdiction.

2. Original and concurrent jurisdiction with justices of the peace to hear and bind over to the superior court all persons charged with any crime within the territory of the general county court, and of which said court is not herein given final jurisdiction.

3. To punish for contempt to the same extent and in the manner allowed by law to the superior courts of this state; to issue writs ad testificandum and other process to compel the attendance of witnesses and to enforce the orders and judgments of the court in the same manner allowed by law to the superior courts of this state.

4. The general county court shall have jurisdiction in all criminal cases arising in the county which are now or may hereafter be given to a justice of the peace, and in addition thereto shall have exclusive original jurisdiction of all other criminal offenses committed in the county below the grade of a felony as now defined by law, and the same are hereby declared to be petty misdemeanors. In all criminal cases heard by a justice of the peace or other committing magistrate of the county against any person for any offense included within the exclusive jurisdiction of the general county court, as herein provided for, and in which probable cause of guilt is found, such person shall be bound in a personal recognizance, or surety, to appear at the next first Monday of the month next succeeding before the general county court for trial, and in default of surety such person shall be committed to the county jail to await trial. [In counties in which there is a special court or courts for cities and towns, the jurisdiction of the general county court in criminal actions shall be concurrent with the jurisdiction conferred] upon such special courts. (1923, c. 216, s. 13; 1924, c. 85, s. 1.)



**§ 1608 (s) 1. Application of article.**

"This article shall not apply to any county in which there has been established a court, inferior to the Superior Court, by whatever name called, by a special act, nor shall this act apply to the following counties: Granville, Iredell, New Hanover, Pasquotank, [Randolph] and Wake, nor shall it apply to the counties in the Sixteenth (16th), Seventeenth (17th), and Nineteenth (19th) Judicial Districts." (1924, c. 85, s. 24-f; 1925, c. 9.)

**ART. 25. PRACTICE AND PROCEDURE.****§ 1608 (t). Procedure in civil actions; return of process.**

The rules of procedure, issuing process and filing pleadings shall conform as nearly as may be to the practice in the Superior Courts. The process shall be returnable directly to the court, and may issue out of the court to any county in the State: *Provided*, that civil process in cases within the jurisdiction now exercised by justices of the peace shall not run outside of or beyond the county in which such court sits.

Motions for the change of venue or removal of cases from the general county courts to the Superior Courts of counties other than the one in which the said court sits may be made and acted upon, and the causes for removal shall be the same as prescribed by law for similar motions in the Superior Courts.

The provisions of the chapters of the Consolidated Statutes on civil procedure and criminal procedure, and all amendments thereof, shall apply as nearly as may be to the general county courts, and the judges and the clerks of said courts, in all causes pending in said courts, shall have rights, privileges, powers and immunities similar in all respects to those conferred by law on the judges and clerks of the Superior Courts of the State, and shall be subject to similar duties and liabilities: *Provided*, that this section shall not extend the jurisdiction of said judges and clerks, nor infringe in any manner upon the jurisdiction of the Superior Courts, except as provided in articles twenty-four and twenty-five of this chapter: *Provided*, that in any civil action instituted in said general county court, where one or more bona fide defendants reside out of said county, then in such case summons may be issued out of said general county court against the defendants residing outside of said county as well as those residing in said county, and the said general county court shall have jurisdiction to try the action as against all of said defendants. (1923, c. 216, s. 7; 1925, c. 242, s. 2; 1925, c. 250, s. 2.)

**§ 1608 (u). Trial by jury; waiver; deposit for jury fee.**

In all civil actions the parties shall be deemed to have waived a jury trial unless demand shall be made therefor before the trial begins. The demand shall be in writing and signed by the party making it, or by his attorney, and accompanied by a deposit of

three dollars to insure the payment of the jury tax: *Provided*, such demand shall not be used to the prejudice of the party making it. [Any defendant in a criminal action may demand a trial by jury, in which event such defendant shall not be required to deposit the sum of three dollars. Such jury shall be drawn as herein otherwise provided for.] (1923, c. 216, s. 8. 1924, c. 85, s. 1.)

### § 1608 (y). Pleadings; time for filing.

The complaint shall be filed by the return day named in the summons and the answer, demurrer or other pleadings on the part of the defendant shall be filed within twenty (20) days thereafter: *Provided*, if a copy of the complaint be served on the defendant at the time of the service of the summons, then the defendant shall have only twenty (20) days from the date of such service to file an answer, demurrer or otherwise plead. If the answer contains a counterclaim against the plaintiff or plaintiffs or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is pleaded or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be pleaded shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim. If a counterclaim is pleaded against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served as herein provided for, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer. For good cause shown and found by the judge, the judge may extend the time for the filing of any of the pleadings provided for in this act on the part of the plaintiff or on the part of the defendant. (1925, c. 250, s. 3.)

**Editor's Note.**—This section was amended in 1925, the changes making it conform to sections 509 and 524 as amended.

## Subchapter VI. Civil County Courts

### ART. 26. UNDER CHAPTER 135, ACTS OF 1925.

### § 1608 (ee). Establishment.

An inferior court with civil jurisdiction only as hereinafter provided may be established by the board of county commissioners of any county in this State upon the petition of a majority of the resident practicing attorneys within the county. (1925, c. 135, s. 1.)

### § 1608 (ff). Jurisdiction.

The said court shall have exclusive original jurisdiction in all civil actions, matters, and proceedings, including all proceedings whatever ancillary, provisional and remedial to civil actions



founded on contract or tort, wherein the Superior Court now has exclusive original jurisdiction: *Provided*, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars (\$3,000).

Said court shall have jurisdiction concurrent with the Superior Court in all actions to try title to land and to prevent trespass thereon and to restrain waste thereof: *Provided*, the sum demanded or the value of property in controversy shall not exceed three thousand dollars (\$3,000).

The said court shall have jurisdiction with the Superior Court in all actions pending in said court to issue and grant temporary restraining orders and injunctions: *Provided*, that the sum demanded or the value of the property in controversy shall not exceed three thousand dollars (\$3,000). (1925, c. 135, s. 2.)

### **§ 1608 (gg). Juries in such court; drawing jury; challenges.**

In the trial of civil actions in said court either the plaintiff at the time of filing complaint or the defendant at the time of filing the answer may in his pleadings demand and have a jury trial as provided in the trial of causes in the Superior Court; failure to demand a jury trial at the time herein provided shall be deemed a waiver of the right to a trial by jury. The judge of said court, when in his opinion the ends of justice would be best served by submitting the issues to the jury, may have a jury called of his own motion and submit to it such issues as he may deem material.

Jurors shall receive the same compensation as is now provided by law for jurors serving in the Superior Court, to be paid out of the treasury of said county on presentation of a ticket duly issued by the clerk of said court; the clerk of said court shall tax the sum of three dollars as cost of jury in all jury cases and the same shall be collected by said clerks and paid into the county treasury of said county.

The commissioners of said county at their regular meeting on the first Monday of April, in the year nineteen hundred and twenty-five, and each two years thereafter, shall cause names of their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose which must have two divisions marked "No. 1" and "No. 2," respectively, and two locks to same, the keys of one to be kept by the sheriff of said county and the other to be kept by the chairman of the board of commissioners of said county, the box to be kept by the clerk of said board, which box shall be marked "County Court." The names in this box shall be drawn for juries acting as jurors in the said county court and when a jury is demanded in said court the sheriff shall cause to be drawn from said box out of partition "No. 1," by a child not more than ten years of age fifteen scrolls and the scrolls so drawn to make the jury shall be put into parti-

tion marked "No. 2," and in all other respects the jury shall be drawn as juries are drawn in the Superior Court. The jurors of this court shall have the same qualifications as provided for jurors in the trial of causes in the Superior Court. The said jurors shall be summoned to attend under the mandate from the clerk of said county court directed to the sheriff of said county: *Provided*, that for sufficient cause the judge of this court may issue an order to the board of county commissioners that no jury be drawn for such term or terms of this court, as may seem best to him.

The challenges allowed in the trial of causes in said county court shall be the same in number and for the same causes as are allowed in the trial of causes in the Superior Court; all jurors drawn from the box shall be regular jurors. The said court shall have the same power to summon tales jurors as the Superior Court now has and when a jury trial is had the jury shall be twelve in number. (1925, c. 135, s. 3.)

#### **§ 1608 (hh). Terms; docket.**

The judge and clerk of said county court are hereby authorized to fix the terms of said court and to make up the docket of said court upon consulting with the bar association of said county. (1925, c. 135, s. 4.)

#### **§ 1608 (ii). Witnesses; how summoned.**

Witnesses shall be summoned by subpœna issued by the clerk of said court as now provided for the summoning of witnesses for the trial of causes in the Superior Court and shall be allowed the same compensation to be taxed as cost by the clerk of this court. (1925, c. 135, s. 5.)

#### **§ 1608 (jj). Appeals.**

Appeals may be taken by either the plaintiff or the defendant from the said county court to the Superior Court of said county in term time for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court, with the exception that the record may be typewritten instead of printed and only one copy thereof shall be required. The time for taking and perfecting the appeals shall be counted from the end of the term. Upon appeals from said county court the Superior Court may either affirm, modify and affirm the judgment of said county court or remand the cause to the county court for a new trial.

The bonds to stay executions shall be the same as now required for appeals from the Superior Court to the Supreme Court. The judgment of the Superior Court shall be certified to said county court; final judgment may be rendered unless there is an appeal to the Supreme Court. In case of appeal to the Supreme Court upon filing of the certificate from the Supreme Court to the Su-



perior Court said certificate shall be transmitted by the clerk thereof to the clerk of this court. (1925, c. 135, s. 6.)

### **§ 1608 (kk). How actions commenced.**

All actions shall be commenced in said court by summons running in the name of the State and issued by the clerk of said county court and shall be returnable as is provided by law for summons in the Superior Court. The plaintiff shall file and retain complaint on or before the return day of such summons; the defendant shall file a written answer or demurrer and shall make his motion in writing during the term to which the summons is returnable and the case shall stand for trial at the next succeeding term. (1925, c. 135, s. 7.)

### **§ 1608 (ll). Judgments.**

The judgment of said court may be enforced by execution issued by the clerk thereof, returnable within twenty days. Transcripts of said judgment shall be docketed in the Superior Court of said county and become judgments of the Superior Court as now provided for executions and transcripts of judgments from the courts of justices of the peace with the same limitations as are now provided for judgments of justices of the peace. (1925, c. 135, s. 8.)

### **§ 1608 (mm). Process of the court.**

The process of said court while exercising the jurisdiction of a justice of the peace shall not run outside of said county. In all other cases these processes shall run as processes issue out of the Superior Court. (1925, c. 135, s. 9.)

### **§ 1608 (nn). Removal of cause before justice.**

When, upon affidavit made before entering upon the trial of any cause before any justice of the peace in said county, it shall appear proper for said cause to be removed for trial to some other justice of the peace, as is now provided by law, said cause may be removed for trial to the said county court. (1925, c. 135, s. 10.)

### **§ 1608 (oo). Rules of practice.**

The rules of practice as prescribed by law for the Superior Court for the trial of all causes shall apply in this court, supplemented, however, by such rules and regulations as may be prescribed by the judge of this court relating to causes pending therein. (1925, c. 135, s. 11.)

### **§ 1608 (pp). Bonds for costs; duties of clerk.**

The statutes about bonds for costs and about suits without bonds for costs that now apply to the Superior Court shall also apply to this court. Wherever the statute provides for a thing

to be done by the clerk of the Superior Court or by the judge of the Superior Court or by either, the same thing shall be performed by the clerk of said county court or by the judge of said county court in causes in said county court; this provision shall apply especially to all provisional remedies as now provided by statute except special proceedings. (1925, c. 135, s. 12.)

#### **§ 1608 (qq). Costs.**

In all causes removed to or brought into the said county court the cost shall be the same as in the Superior Court. All cost shall be paid to or collected by the clerk of said county court in the same manner as in the Superior Court and be paid by the said clerk of said county court into the treasury of said county: *Provided*, that for the service of process the fees shall be paid to the officer serving the process. The officers shall perform all the duties in said county court as provided in the Superior Court and receive therefor the same fees as allowed for the same service performed in the Superior Court. (1925, c. 135, s. 13.)

#### **§ 1608 (rr). Appointment and compensation of judge; substitute; vacancies.**

After the ratification of this act and the establishment of such court by any county, it shall be the duty of the clerk of the board of commissioners of such county to immediately notify the Governor who shall appoint a judge to preside over such court, and each fourth year thereafter it shall be the duty of the Governor to appoint the judge of each such county court who shall preside over said court, who shall be learned in the law, of good moral character, and who shall at the time of his appointment and qualification be an elector in and for said county; that the said judge shall hold office for a term of four years and until his successor is appointed and qualified. And before entering upon the duties of his office the said judge shall take and subscribe an oath of office as is now provided by law for the judges of the Superior Court and file the same with the clerk of the Superior Court of said county; and the said clerk shall record the same. Said judge shall receive a salary of one hundred dollars (\$100) a week for each week that he is engaged in holding court, payable in equal weekly installments out of the treasury of said county.

The said judge shall not by reason of his office be prohibited from practicing the profession of attorney at law in other courts of this State except as to matters pending in connection with or growing out of said county court.

When the said judge is unable to preside over said court on account of sickness or absence for other cause he shall appoint some other person learned in the law who shall take the same oath and possess the same qualifications as provided for the judge, to act as a substitute judge with all the powers and duties of the judge, and



the compensation of said substitute judge shall be paid by the said judge.

Any vacancy occurring in the office of judge shall be filed by the Governor of the State. (1925, c. 135, s. 14.)

**§ 1608 (ss). Compensation of clerk; vacancy; files, books, stationery, etc.**

The clerk of the Superior Court of said county by himself or his deputies shall ex officio perform the duties of clerk of said county court and shall be paid a sum not less than one thousand dollars (\$1,000) annually, the amount to be determined by the board of commissioners of said county and paid out of the treasury of said county as full compensation for his duties as clerk of said county court. Upon the failure of the clerk of the Superior Court of said county to qualify under this act or in case of any vacancy in the office of clerk of the said county court such vacancy shall be filled by the board of commissioners of said county. The necessary files, books, stationery and other material of that nature shall be furnished to the clerk of said county court by said county. (1925, c. 135, s. 15.)

**§ 1608 (tt). Stenographer; fees.**

There shall be an official stenographer of this court whose duty shall be the same as the official stenographer of the Superior Court of said county. Said stenographer fees shall be the same in amount as the fees of the official stenographer of the Superior Court of said county and shall be taxed as cost. (1925, c. 135, s. 16.)

**§ 1608 (uu). Procedure.**

The procedure of said county court, except that hereinbefore provided, shall follow the rules and principles laid down in the chapter on civil procedure in the Consolidated Statutes and amendments thereto in so far as the same may be adopted to the needs and requirements of the said county court. (1925, c. 135, s. 17.)

**§ 1608 (vv). Records.**

There shall be dockets, files, and records kept of all proceedings in the said county court, conforming as nearly as possible to the records of the Superior Court. (1925, c. 135, s. 18.)

**§ 1608 (ww). To be court of record.**

The said county court shall be a court of record and the clerk thereof shall be provided with a seal of said court. (1925, c. 135, s. 19.)

**§ 1608. (xx). Pending cases.**

All cases pending in the Superior Court of said county and in the courts of the justice of the peace of said county on the date the

court is established shall be tried in the courts wherein they are pending. (1925, c. 135, s. 20.)

**§ 1608 (yy). First session.**

The presiding judge of said county court shall hold the first session of said county court within thirty days after his appointment by the Governor, and other sessions shall be held as provided in this article. (1925, c. 135, s. 21.)

**§ 1608 (zz). Discontinuance of court.**

The board of commissioners of any county may discontinue such court on written petition signed by the majority of the practicing attorneys of such county. (1925, c. 135, s. 22.)

**§ 1608 (aaa). Existing laws not repealed.**

The article shall not be construed to repeal chapter twenty-seven of the Consolidated Statutes; chapter two hundred and sixteen of the Public Laws of one thousand nine hundred and twenty-three, or any amendments thereto, (Articles 24 and 25 of this chapter) nor shall it repeal or affect any act establishing any inferior court now existing or that may hereafter be created under the existing law but shall be construed to be supplemental to the existing law and a method by which county courts have been established. (1925, c. 135, s. 23.)

**§ 1608 (bbb). Article not applicable to certain counties.**

The provisions of this article shall not apply to the following counties: Burke, Hyde, Avery, Alexander, Clay, Catawba, Mitchell, Madison, Graham, Swain, Henderson, Duplin, Jackson, Davie, Cherokee, Stokes, Lincoln, Wilkes, Johnston, Person, Pamlico, Watauga, Haywood, Vance, Robeson, Craven, Caldwell, Hoke, Yancey, Anson, Pender, Macon, Onslow, Bladen, Alleghany and Scotland: *Provided*, this bill shall not apply to any of the counties of the present Sixteenth and Seventeenth Judicial Districts. (1925, c. 135, s. 24.)

ART. 27. UNDER CHAPTER 167, ACTS OF 1925.

**§ 1608 (ccc). Establishment.**

In addition to the plan for a general county court, provided for in chapter two hundred sixteen, Public Laws, session of one thousand nine hundred and twenty-three, (Articles 24 and 25 of this chapter) and amendments thereto, there may be established by the board of county commissioners in any county, a court of civil jurisdiction, which shall be a court of record and which shall be maintained pursuant to this act, and which court shall be called the county civil court, and shall have civil jurisdiction as herein provided. (1925, c. 167, s. 1.)



**§ 1608 (ddd). Qualification, election, and term of judge; office.**

The county civil court shall be presided over by a judge, who may be an attorney at law, and shall reside and be qualified elector in the county during his term of office, and shall be permitted to practice law during his term of office. The first judge of the county civil court shall be elected by the board of county commissioners at the time of the establishment of said court, and he shall hold his office until January first, following the next general election of county officers within said county, and until his successor is elected and qualified, and if a vacancy occurs in the office of judge, it shall be filled by the election of a successor for the unexpired term by the board of county commissioners. Each succeeding judge shall be elected by a vote of the qualified electors of the county at the next general election before the expiration of the term of office in the same manner as other county officers are nominated and elected, and shall hold office for a term of four years, beginning January first, following his election and until his successor is elected and qualified, unless said court is abolished. The judge shall qualify by taking and subscribing an oath of office as is now provided by law for a judge of the Superior Court, which shall be filed with the clerk. The salary of said judge shall be fixed by the board of commissioners of the county, which shall not be decreased during the term of office; to be paid in monthly installments by the county. The judge shall be provided by the county board of commissioners with an office and a suitable and convenient room for holding court at the county seat. (1925, c. 167, s. 2.)

**§ 1608 (eee). Substitute judge.**

When the judge of said county civil court is unable to hold court on account of sickness, absence, disqualification, or other cause, he shall appoint some other person learned in the law, who shall take the same oath and possess the same qualifications as provided for a judge, to act as substitute judge, who shall be invested with all the powers and duties of the judge, and his compensation during his appointment shall be paid by the said judge. (1925, c. 167, s. 3.)

**§ 1608 (fff). Terms of court; calendar.**

The court shall open for the transaction of business and trial of cases on the first Monday of each month and continue until the matters of the court are disposed of, and it shall be the duty of the judge to prepare a calendar of cases for trial, on which jury cases shall have precedence. (1925, c. 167, s. 4.)

**§ 1608 (ggg). Clerk of court.**

The clerk of the Superior Court of the county shall be ex officio clerk of the court, and in addition to the salary or fees paid him as clerk of the Superior Court, he shall be paid such additional compensation as the county commissioners of the county may fix to be

paid monthly out of the county funds, and the board of county commissioners be and are hereby authorized and empowered to provide for salary or fees for such additional deputies as he may need. The said clerk shall be liable upon his official bond for the discharge of his duties and caring for funds paid to him as clerk, to the same extent as he is bound as clerk of the Superior Court. (1925, c. 167, s. 5.)

**§ 1608 (hhh). Sheriff.**

The sheriff of the county, or his deputies, appointed, shall attend upon the same terms of this court in the same manner and with the same power and authority as he does and has in attendance upon the Superior Court of the county. The county commissioners of the county are authorized to make said sheriff such additional allowances as they may fix for such services, in addition to his salary or fees fixed by law. (1925, c. 167, s. 6.)

**§ 1608 (iii). Records; blanks, forms, books, stationery.**

The clerk of the court shall keep separate records for the use of the said court to be furnished by the county commissioners, and they shall also provide such necessary blanks, forms, books, and stationery as may be needed by the court, and the clerk shall keep the same in the office of the clerk of the Superior Court. (1925, c. 167, s. 7.)

**§ 1608 (jjj). Juries.**

The jury in said court shall be a jury of twelve and the trial shall be conducted as nearly as possible as in the Superior Court. In all actions the parties shall be deemed to have waived a jury trial, unless demand shall be made therefor, as hereinafter provided in writing. The plaintiff in filing the complaint, or the defendant at the time of filing answer, may in the pleadings demand a jury trial, or in cases transferred from the Superior Court to the said court, either party may demand jury trial, in writing, signed by the party making it or his attorney, which must be made at the time of such transfer. Any demand for a jury trial shall be accompanied by a deposit of five dollars (\$5.00), to insure the payment of the jury tax, except in cases brought in forma pauperis, provided such demand shall not be used to the prejudice of the party making it. (1925, c. 167, s. 8.)

**§ 1608 (kkk). Jury list; summons.**

It shall be the duty of the board of county commissioners, upon the establishment of a court as herein provided, and every two years thereafter, to prepare a list of jurors, identical with the list prepared for the Superior Court and subject to the same rules and regulations, and mark said jury box as the county civil court box, from which the jury shall be drawn. The judge of the court shall issue the proper writ to the sheriff of the county to summons the



jurors for the court in the same manner as juries are ordered and drawn in the Superior Court. (1925, c. 167, s. 9.)

### **§ 1608 (III). Talesmen.**

The judge shall have the right to call in talesmen to serve as jurors, according to the practice of the Superior Court, and to direct the sheriff to summons a sufficient number of talesmen to serve during any one week for the proper dispatch of the business of the court. (1925, c. 167, s. 10.)

### **§ 1608 (mmm). Procedure, process, pleadings, etc.**

The procedure, practice, processes, pleadings and procuring evidence and judgments shall conform as near as may be to the courts having concurrent jurisdiction with this court. (1925, c. 167, s. 11.)

### **§ 1608 (nnn). Appeals.**

Appeals in all actions may be taken from the court to the Superior Court of the county in term time for errors assigned in matters of law in the same manner as is now provided for appeals from the Superior Court to the Supreme Court, with the exception that the record may be typewritten instead of printed, and only two copies shall be required; one for the court and the other for the opposing counsel. The time for taking and prosecuting appeals shall be counted from the end of the calendar month of the court at which such trial is had. It shall be the duty of any judge of the Superior Court holding the courts in any county, where a court is established under the provisions of this act, to allot sufficient and adequate time during each regular term of the Superior Court held in such county for the hearing of appeals from the county civil court of such county. Upon such appeal the Superior Court may either affirm or modify and affirm the judgment of the county civil court or remand the cause for a new trial. From the judgment of the Superior Court an appeal may be taken to the Supreme Court, as is now provided by law. Orders to stay execution on judgments entered in the court shall be the same as in appeals from the Superior Court to the Supreme Court, and judgments of said court may be enforced by execution by the clerk thereof, returnable within twenty days, and transcripts of such judgments may be docketed in the Superior Court and become judgments of the Superior Court as is now provided. Transcripts may be docketed in the Superior Court as now provided for judgments of justices of the peace, and when docketed shall in all respects be judgments in the same manner and to the same extent as if rendered by the Superior Court. (1925, c. 167, s. 12.)

### **§ 1608 (ooo). Jurisdiction.**

The county civil court shall have jurisdiction only in civil matters, and as follows:

(1) Jurisdiction concurrent with that of the justices of the peace of the county;

(2) Jurisdiction concurrent with the Superior Court in all actions founded on contract; wherein the amount demanded shall not exceed the sum of five thousand dollars (\$5,000), exclusive of interest and cost;

(3) Jurisdiction concurrent with the Superior Court in all actions not founded upon contract; wherein the amount demanded shall not exceed the sum of five thousand dollars (\$5,000), exclusive of interest and cost;

(4) Jurisdiction concurrent with the Superior Court in all actions to try title to lands and to prevent trespass thereon and to restrain waste thereof;

(5) Jurisdiction concurrent with the Superior Court in all actions pending in said court to issue and grant temporary and permanent restraining orders and injunctions. (1925, c. 167, s. 13.)

**§ 1608 (ppp). Stenographer; fees.**

There shall be an official stenographer of the court whose duties and fees shall be the same and taxed as those of the official stenographer of the Superior Court. (1925, c. 167, s. 14.)

**§ 1608 (qqq). Disqualification of judge.**

Where the judge is disqualified to try any case, it shall be removed for trial to the Superior Court of the county, in which the court is located or ore tenus by the substitute judge. (1925, c. 167, s. 15.)

**§ 1608 (rrr). Pending cases, transfer.**

By consent of plaintiff and defendant any case, within the jurisdiction of the court, pending in the Superior Court may be transferred to the docket of the county civil court, and there tried. (1925, c. 167, s. 16.)

**§ 1608 (sss). Abolishing court.**

This court may be abolished by resolution of the board of county commissioners of any county for such county by giving written notice of such intention six months prior to the end of the term of any presiding judge thereof, to become effective at the end of such term of office; and, in case of the abolition of the court, cases then pending shall be transferred to the Superior Court. (1925, c. 167, s. 17.)

**§ 1608 (ttt). Existing laws not repealed.**

This act shall not be construed to repeal any existing laws by which a county court may be created or to affect or repeal any court now or hereafter created under existing laws and shall only be construed to be an additional method by which a county court may be established. (1925, c. 167, s. 18.)



**§ 1608 (uuu). Article inapplicable to certain counties.**

This article shall not apply to the counties of Bladen, Jones, Bertie, Caldwell, Craven, Columbus, Gaston, Henderson, Mitchell, Vance. (1925, c. 167, s. 19.)

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**CHAPTER 28.****DEBTOR AND CREDITOR****ART. 1. ASSIGNMENTS FOR BENEFIT OF CREDITORS.****§ 1609. Debts mature on execution of assignment; no preferences.**

**What Constitutes an Assignment.**—The Supreme Court has held that where a person, who is insolvent makes an assignment of practically all his property to secure a preexisting debt, there being also other creditors, such instrument will be treated as an assignment for the benefit of creditors and subject to the statutes relating thereto, and neither the omission of a small part of the debtor's property nor a defeasance clause in the instrument will change this result. *Bank v. Tobacco Co.*, 188 N. C. 177, 178, 124 S. E. 158.

**Same—Chattel Mortgages.**—A chattel mortgage, attempted to be executed by an insolvent corporation owing other creditors, to secure a pre-existing debt on practically all of its property, will be treated as an assignment, and void, unless the requirements of the statute have been complied with, and no lien otherwise on the property described therein can be thereby created. *Banking, etc., Co. v. Tobacco Co.*, 188 N. C. 177, 124 S. E. 158.

**A chattel mortgage on a stock of goods**, securing the purchase price, cannot be deemed an assignment for the benefit of creditors where the secured debt is contemporaneous with the contract of purchase, as a part of one continuous transaction. *Cowan v. Dale* (N. C.), 128 S. E. 155.

**What Constitutes a Preference.**—No preference is given either at common law or in equity, or by statute, for clerk hire in a store for services rendered prior to the appointment of a receiver for the owner, on application of creditors, C. S., 859, 860, 1113 (6), and no permissible interpretation in favor of such a preference can be derived by analogy to our statutes, this section and section 1618, applying to a voluntary assignment for the benefit of creditors, or the other sections of chapter 28. *Mascot Stove Mfg. Co. v. Turnage*, 183 N. C. 137 110 S. E. 779.

**§ 1611. Trustee to recover property conveyed fraudulently or in preference.**

**A chattel mortgage on a stock of goods to secure the purchase price**, mortgagor retaining possession is not a preference within this section. *Cowan v. Dale* (N. C.), 128 S. E. 155.

**§ 1618. Priority of payments by trustee.**

See notes to section 1609.

## CHAPTER 29

## DESCENTS

## § 1654. Rules of descent.

Rule 8. When any person dies intestate leaving none who can claim as heir to such deceased person, but leaving surviving a widow or husband such widow or husband shall be deemed his heir and as such inherit his estate. (Rev., c. 1556; Code, s. 1281; R. C., c. 38; 1801, c. 575, s. 1; 1925, c. 7.)

**Editor's Note.**—Only Rule of 8 of this section was affected by the amendment of 1925; consequently the remainder of the section was not repeated here. Provision is now made for a surviving husband as well as a widow.

**Rule 1.**—See post, this note, Rule 12.

**Rule 2—Advancement Defined.**—An advancement may be defined as a provision made by a parent on behalf of a child for the purpose of advancing said child in life, and to enable him to anticipate his inheritance to the extent of such advancement. *Southern Distributing Co. v. Carraway*, 189 N. C. 420, 127 S. E. 427.

**Same—Value Determined.**—Ordinarily the value of an advancement is to be determined as of the date of its making and on an accounting no interest is to be charged against an advancement prior to the death of the testator or intestate, or the time fixed for division, where by will it is extended beyond the death of the parent or testator. *Southern Distributing Co. v. Carraway*, 189 N. C. 420, 127 S. E. 427.

**Rule 5—Illegitimates Not Included.**—An illegitimate child is not a collateral relation of, and capable of inheriting from, a legitimate child of the same mother, under this section. *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181, 182.

**Rule 6—Effect of Amendment of 1915.**—Upon the death of minor child who takes an estate in remainder as a new propositus after the death of his mother, under his grand-father's will, without brother or sister or issue of such, the inheritance in cast under Rule 6 of the Canons of Descent before the amendment of 1915, upon the father, if living, the amendment having the effect of making the father and mother tenants in common, with the right of survivorship. Semble, under the amendment the devise of these lands of the wife vests her interest in the husband. *Allen v. Parker*, 187 N. C. 376, 121 S. E. 665.

**Rule 7.**—As to the effect of this rule on section 4169 see the notes to the latter section.

**Rule 8—Wife Heir Rather Than Illegitimate Half-Brother.**—Decedent left a wife and no descendants or collateral relatives except an illegitimate half-brother. The wife and not the half-brother is the heir in such case. *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181.

**Rule 9—When Applicable.**—Rule nine of this section applies only to inheritance from the mother and not to the inheritance from a legitimate half-brother. *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181.

**Rule 10—When Applicable.**—Rule 10 of this section applies only to inheritance from illegitimate children and not inheritance from illegitimate child by a bastard. *Wilson v. Wilson*, 189 N. C. 85, 126 S. E. 181.

**Rule 12—Interest of Wife.**—The resulting trust in favor of the wife in lands the title to which has been acquired by her husband by deed is now descendible to her heirs under our canons of descent, defining seizin to be any right, title or interest in the inheritance, under the definition of seizin, for the purpose, being any right, title or interest in the inheritance (this section,) though she may not have been in separate pos-



session thereof during her life. *Barrett v. Brewer*, 153 N. C. 547, 69 S. E. 614, cited and distinguished. *Tyndall v. Tyndall*, 186 N. C. 272, 119 S. E. 354.

**Same—Husband as Tenant by the Curtesy.**—Where the husband had the legal title to lands conveyed to him, in which the wife had a trust resulting in her favor, she having furnished the purchase money, after her death her husband is entitled to an estate therein as tenant by the curtesy under this section, there being children of the marriage born alive and capable of inheriting. The old common-law rule, and changes therein made by statute, discussed by *Adams*, *J. Tyndall v. Tyndall*, 186 N. C. 272, 119 S. E. 354.

**Same—Descendible Interest to Issue of Daughter.**—Under the provisions of Rules 1 and 12, this section, a devise to the daughter of the testator and her issue, upon the death of the testator's son without issue, is such an interest as is descendible to the issue of the daughter when she has died before the happening of the contingency. *Hines v. Reynolds*, 181 N. C. 343, 107 S. E. 144.

**Same—Dependent Contingency.**—Upon an estate to W. during his life, and at his death to his eldest son, not then in esse, with residuary clause to testator's children; upon the happening of the contingency of the birth to W. of a son, it was held that the son takes upon his birth a vested interest, not depending upon his living longer than his father, and upon the falling-in of the life estate it descends, under our present canons of descent, to his next of kin, and does not fall within the residuary clause. *Carolina Power Co. v. Haywood*, 186 N. C. 313, 119 S. E. 500.

**Same—New Propositus.**—A devise of land to testator's two daughters for life, and at the death of either or both of them, then said land shall go to the child or children of each, the child or children representing the mother in interest: Held, upon the marriage of one of them, and having issue born alive, the issue so born takes by purchase under the will, and is a new propositus for the purpose of descent. *Allen v. Parker*, 187 N. C. 376, 121 S. E. 665.

## CHAPTER 30

### DIVORCE AND ALIMONY

#### § 1657. Venue.

**Change in Common-Law Rule.**—The common-law rule that the wife should bring her action for divorce in the domicile of her husband was changed by this section, under the title of "Venue," providing that the summons be returnable to the county wherein the applicant resides, and by amendment to the section, chapter 229, Public Laws 1915, making the summons returnable to the county in which either the plaintiff or defendants reside. *Wood v. Wood*, 181 N. C. 227, 106 S. E. 753.

**Action Brought in Wrong County.**—It has been held repeatedly that sections 465-470 relate to venue and not jurisdiction, and that if an action is brought in the wrong county it should be removed to the right county, and not dismissed, if the motion is made in apt time, and if not so made, that the objection is waived, and we do not think that this section was intended to change this principle or that it has any effect. *Davis v. Davis*, 179 N. C. 185, 188, 102 S. E. 270.

It is evident that the General Assembly did not so intend because it placed this section under the title of venue and not of jurisdiction, and nothing appears to show the purpose to take an action for divorce out of

the general principle, which prevails that any action brought in the county may be removed instead of dismissing it, and that a failure to make the motion for removal is a waiver of the objection to the county in which it is brought. *Davis v. Davis*, 179 N. C. 185, 187, 102 S. E. 270.

**Same—Demurrer.**—A demurrer to an action for divorce brought by the wife in the county of her own residence, when the husband resides in a different county, on the ground that the summons should have been made returnable to the county of his residence, is bad. *Wood v. Wood*, 181 N. C. 227, 106 S. E. 753.

**Action in County of Forced Residence.**—When the acts and conduct of the husband make the wife's condition so intolerable and burdensome as to compel her to leave home and remain therefrom, and, after he has refused to contribute to her support, they eventually enter into a contract of separation, with an allowance to her of a certain sum of money to be periodically paid, and then the husband breached his contract by refusal to pay, she may maintain her action in the county wherein she had been forced to reside by the conduct of her husband, under the provisions of C. S., secs. 1667, and this section. *Rector v. Rector*, 186 N. C. 618, 120 S. E. 195.

**Waiver.**—The provision of this section is not jurisdiction and may be waived, and the failure therein must be taken advantage of by motion to remove the cause to the proper venue, and not to dismiss. *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270.

## § 1659. Grounds for absolute divorce.

**In General.**—In *Lee v. Lee*, 182 N. C. 61, 63, 108 S. E. 352, it was said:—"The grounds for divorce are entirely statutory and vary in the different states. The status is thus summed up in 19 C. J., 71: 'In some states insanity is made a ground for divorce by statute' (but it may be said that it seems this is confined to the State of Washington), 'while in others a divorce is absolutely prohibited where either party is insane. In the absence of statute insanity arising after marriage is not ground for divorce.' This State comes under the latter head.

"While it is in the power of the Legislature of this State to make the misfortune of either party a ground for divorce, it has not done so, and the Court cannot by judicial construction extend the grounds of divorce beyond the statute. With us, the lawmaking power has adhered to the obligation of the marriage vow, that the parties 'take each other for better or for worse, to live together in sickness and in health till death do them part,' with the exceptions only where the misconduct of the parties, and not their misfortunes, are made by our statute to justify the divorce." *Lee v. Lee*, 182 N. C. 61, 63, 108 S. E. 352.

**Separation as Ground.**—This section as amended by ch. 63, Laws 1921, making a separation of husband and wife for five years a ground for absolute divorce, does not extend to granting the decree upon the suit of the party in fault, or where the other party has been forcibly separated by infirmity; nor will the divorce be granted at the suit of the husband when the separation of the wife has been occasioned by her incarceration in a hospital for the insane. *Lee v. Lee*, 182 N. C. 61, 108 S. E. 352.

Where the husband appeals from a judgment in favor of his wife, in her action for an absolute divorce, because of his separation from her for five years, this section amended by Public Laws of 1921, ch. 63, and assigns error only in the court's refusing his motion to nonsuit upon the evidence on the ground that he was insane for a part of the time, it is necessary, so that we may pass upon its sufficiency, that the evidence should appear in the record and not in the assignment merely. *Brown v. Brown*, 182 N. C. 42, 108 S. E. 380.



**§ 1661. Affidavit to be filed with complaint; affidavit of intention to file complaint.**

The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint. The plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant has been a resident of the state for two years next preceding the filing of the complaint; or, if the wife be the plaintiff, that the husband is removing, or about to remove, his property and effects from the state, whereby she may be disappointed in her alimony; [Provided, however, that if the cause for divorce is five years separation then it shall not be necessary to set forth in the affidavit that the grounds for divorce have existed at least six months prior to the filing of the complaint, it being the purpose of the section to permit a divorce after a separation of five years without waiting an additional six months for filing the complaint]. If any wife files in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which the petition or action will be based for six months, she may reside separate and apart from her husband, and may secure for her own use the wages of her own labor during the time she remains separate and apart from him. If she fails to file her petition or bring her action for divorce within ninety days after the six months have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section. (Rev., s. 1563; Code, s. 1287; 1868-9, c. 93, s. 46; 1869-70, c. 184; 1907, c. 1008, s. 1; 1925, c. 93.

**Alleging Two Years' Residence.**—It is not required that the two years residence in the State of the plaintiff in an action for absolute divorce be alleged in the complaint to confer jurisdiction, but it is sufficient if it is set out in the accompanying affidavit. *Williams v. Williams*, 180 N. C. 273, 104 S. E. 561.

**§ 1662. Material facts found by jury; parties cannot testify to adultery.**

The object of this section was to prevent judgment being taken by default, or by collusion, and to require the facts to be found by a jury. *Campbell v. Campbell*, 179 N. C. 413, 415, 102 S. E. 737.

**Time for Answering Not Affected.**—The provision of this section putting in a denial of the plaintiff's allegations in an action for divorce, does not affect the defendant's right of twenty days after completion of

the service of the summons by publication, in which to answer or demur, etc. *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737. See note of this case under section 1467.

**Meritorious Defense Presumed.**—The denial by the statute of the plaintiff's allegations in an action for divorce, presumes, as a matter of law, a meritorious defense, and does not require that this be found by the judge in passing upon a motion to set aside a judgment rendered in an action. *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737.

**Affidavit of Wife Not Competent as Evidence.**—In *Vickers v. Vickers*, 188 N. C. 448, 450, 124 S. E. 737. The Court said:—"On perusal of the record it appears that the affidavit of the wife, charging adultery on the husband, is submitted as part of her evidence pertinent to the inquiry. As an independent fact, such evidence seems to be absolutely forbidden by the statutes and public policy controlling in the matter."

### § 1664. Custody of children in divorce.

**In General.**—The Superior Court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, by this section, and though by proceedings in habeas corpus under the provisions of C. S., 2241, the custody of a child of the marriage may be awarded as between parents each of whom claim it. This applies only when the parents are living in a state of separation, without being divorced, or suing for a decree of divorcement, and where the decree of divorcement has been granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion in that cause. Quere, whether the statute relating to the juvenile courts, §§ 5039 et seq. confer jurisdiction in such instances. In *re Blake*, 184 N. C. 278, 114 S. E. 294. See notes of this case under section 2241.

**Effect of Consent Judgment.**—Where consent judgment in action for divorce, a mensa, operates as a gift to wife of an estate in husband's land, the courts awarding custody of children does not affect it. *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25.

### § 1666. Alimony pendente lite; notice to husband.

See notes to section 1667.

**Amount Within Judicial Discretion.**—"While the right to alimony involves a question of law, the amount of alimony and counsel fees is a matter of judicial discretion and usually not reviewable." *Davidson v. Davidson*, 189 N. C. 625, 127 S. E. 682, 683.

**Same—Usually One Third Net Income.**—Expecting attorney's fees and expenses, the amount ordinarily allowed pendente lite under this section is not in excess of the amount prescribed by section 1665 upon a final judgment for divorce from bed and board; that is, one-third part of the net annual income from the estate and occupation or labor of the party against whom the judgment is rendered. 19 C. J. 222 (532). But this rule is not inflexible, and the amount to be allowed is not arbitrarily fixed by the statute. *Davidson v. Davidson*, 189 N. C. 625, 127 S. E. 682, 683.

**Same—Excessive Allowance.**—An allowance of alimony pendente lite in excess of the net income of the defendant is excessive. *Davidson v. Davidson*, 198 N. C. 625, 127 S. E. 682.

**Lien on Lands and Sale.**—Where alimony pendente lite has been regularly granted to the wife in her action for divorce against her nonresident husband, who has abandoned her, the court may decree it a lien upon his lands described in the complaint and situate here, and order the sale thereof for its payment; and it is not necessary that the defendant should have had notice of the wife's application therefor. *White v.*



White, 179 N. C. 592, 103 S. E. 216. See note of this case under section 492.

**Findings by Superior Court Judge.**—The Superior Court judge, in allowing alimony to the wife pendente lite, under the provisions of this section, must find the essential and issuable facts and set them out in full for the purposes of the appeal, so that the Supreme Court may determine therefrom whether the order appealed from should be upheld, and his general and inconclusive estimate of such facts is insufficient; and where her action is for a divorce a mensa on the ground of abandonment, for that she was compelled to leave home by the conduct of her husband, the judge must find such facts that would justify her in law for so doing, at the time she left her husband, and those that occurred thereafter are insufficient. *Horton v. Horton*, 186 N. C. 332, 119 S. E. 490.

### § 1667. Alimony without divorce.

See notes to section 1657.

**"Alimony without Divorce."**—While as to technical alimony the ordinary rule is that the title to the property designated, to enforce the order of the court remains in the husband, and it will revert to him upon reconciliation with or the death of the wife, this rule does not apply to an allowance for the reasonable support of the wife, etc., under the provisions of this section, and the words used in the beginning of this section, "alimony without divorce," will not be construed to give the word "reasonable subsistence" for the wife, the meaning of technical alimony. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

**Technical alimony** is the allowance made to the wife in suits for divorce, and may be secured by a proportionate part of the husband's estate judicially declared; or if he have no estate, it may be "made a personal charge against him," and it materially differs from a reasonable subsistence, etc., allowable in the wife's proceedings under the provisions of this section, where a divorce is not contemplated; and where, in accordance with the statute, the order allowing her such subsistence may secure the same out of the husband's estate. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

**The husband's "estate,"** from which the court may secure its order allowing a reasonable subsistence, etc., to the wife in her proceedings under the provisions of this section, includes within its meaning income from permanent property, tangible or intangible, or from the husband's earnings. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

**Effect of § 4447.**—Section 4447 requiring the state to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, does not deprive the wife of her civil remedies under the provisions of this section. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

**Section 1665 Not Applicable.**—The restrictions imposed upon the judge in making an allowance to the wife for alimony in suits for divorce, C. S., 1665, do not apply to the exercise of his sound discretion in proceeding under the provisions of this section, by the wife to obtain a reasonable subsistence, costs, and counsel fees from her husband. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

**Finding of Facts by Judge Unnecessary.**—In the wife's application for alimony without divorce (under this section, and amendments thereto) it is not required that the judge hearing the matter shall find the facts as a basis for his judgment, as in proceedings for alimony pendente lite (C. S., 1666), though it is necessary that she allege sufficient facts to constitute a good cause of action thereunder. *Semble*, the better practice is for the court to find the facts when the same are in dispute, as was done in this case. *Price v. Price*, 188 N. C. 640, 125 S. E. 264.

**Same—Effect of Amendment of 1919.**—The effect of this section, has been changed by statute, chapter 24, Public Laws of 1919, and thereunder it is not now required that an issue involving the validity of the mar-

riage be first determined before the wife may sustain her civil action against her husband for an allowance for a reasonable subsistence and counsel fees, pending the trial and final determination of the issue relating to the validity of the marriage. *Barbee v. Barbee*, 187 N. C. 538, 122 S. E. 177.

**Discretion of Judge.**—The amount allowed for the reasonable subsistence, cost, and attorney's fees to the wife in her proceeding against her husband under the provisions of this section, is within the sound discretion of the judge hearing the same and having jurisdiction thereof. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

**Modification or Vocation of Order.**—Where, within the exercise of his sound discretion, the Superior Court judge, having jurisdiction, has allowed the wife a reasonable subsistence, attorney's fees, etc., in her proceedings under the provisions of this section, the order of allowance may be thereafter modified or vacated as the statute provides, upon application to the proper jurisdiction for the circumstances to be inquired into and the merits of the case determined. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

**Husband's Interest in Estate by Entireties Chargeable.**—Where husband and wife own land by entireties, the rents and profits of the husband therein may be charged with the support of the wife and the minor children of the marriage upon his abandonment of her, under the provisions of this section, and for her counsel fees by chapter 123, Public Laws of 1921, in these proceedings; and to enforce an order allowing her alimony and attorney's fees, according to the statutes, a writ of possession may issue (C. S., sec. 1668) to apply thereto the rents and profits as they shall accrue and become personalty; and an order for the sale of land conveying the fee-simple title for the purpose of paying the allowance is erroneous. *Holton v. Holton*, 186 N. C. 355, 119 S. E. 751.

An estate conveyed in entirety in fee to husband and wife is one to which the right of survivorship is applicable, the husband, during the joint estate, have the right of possession and to the rents and profits, though he is not entitled to a homestead therein as against the interest of the wife (under this section), the title thereto vesting in the one on the death of the other, and not subject to execution for the debts of either during the continuance of the joint estate. *Holton v. Holton*, 186 N. C. 355, 119 S. E. 751.

**Previous Contract of Separation.** — Where the defendant resists his wife's application for alimony without divorce under this section, upon the ground that there was still in effect a valid contract of separation they both had executed, and appeals from an adverse decision of the trial judge hearing the matter, the record on appeal should set out the writing of separation so that the Supreme Court may determine whether it was reasonable, just and fair to the wife, and whether in taking her acknowledgment the officer had properly certified that it was not unreasonable or injurious to her, as the statute requires. *Moore v. Moore*, 185 N. C. 332, 117 S. E. 12.

Where it is urged for the defendant upon his wife's application for alimony without divorce, under this section, that he and his wife had entered into a contract of separation and had not thereafter resumed the marital relation, it is competent for the husband to show the matters he relies upon his defense, but it is for the trial judge to decide the truth of the matter upon all of the evidence, though his findings are not to be received as evidence, by the jury passing upon the issue properly presented to them at the trial of the case. *Moore v. Moore*, 185 N. C. 332, 117 S. E. 12.

**Allowance for Attorney's Fees.**—While the allowance to be made by the judge for the "subsistence" of the wife from the earnings or estate of her husband, under the provisions of this section, in her application for alimony without divorce, is not regarded as synonymous with "alimony" and does not in terms include the allowance for attorney's fees, by recent



statutory amendment the court may now allow her attorney's fees. *Moore v. Moore*, 185 N. C. 332, 117 S. E. 12.

**Intervener in Another Jurisdiction.**—Where the wife has obtained an order for support from her husband, declared a lien on his property, under this section, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process, or waiver by her husband in an appropriate civil action against him. Whether the lien of the wife will in any event prevail as against the lien of a valid attachment first levied in another court of equal concurrent jurisdiction, *Quaere?* *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882.

**Defeasible Fee in Part of Husband's Land.**—Where the judge, in the proceedings of the wife for an allowance of a reasonable subsistence, has impressed a trust upon the husband's land for the enforcement of the decree, the fact that in a part of the land he has only a defeasible fee, cannot prejudice him, and his exception on that ground cannot be sustained. *Anderson v. Anderson*, 183 N. C. 139, 110 S. E. 863.

**Statute of Limitations.**—The common-law rule that there is no statute of limitations barring an action for divorce obtains in this jurisdiction, applying the rule that the proceedings, as a matter for the court, should have been commenced without unreasonable delay, except in so far as it may have been modified by this section, barring all action not otherwise provided for in ten years. *Garris v. Garris*, 188 N. C. 321, 124 S. E. 314.

## § 1668. Alimony in real estate, writ of possession issued.

**Effect of Award of Custody of Children.**—Where consent judgment in action for divorce, a mensa, operates as a gift to wife of an estate in husbands' land, the courts awarding custody of children does not affect it. *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25.

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## CHAPTER 31

### DOGS

#### ART. 2. LICENSE TAXES ON DOGS

### § 1680. Permitting dogs to run at large at night; penalty; liability for damage.

For local act applicable to Buncombe, New Hanover, Halifax, and Wake counties, see Acts 1925, c. 314.

### § 1681. Proceeds of tax to school fund; proviso, payment of damages; reimbursement by owner.

The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected: Provided, it shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damage as aforesaid, the said county com-

missioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this article; [Provided, that before appointing a jury or making any payment, the commissioners shall satisfy themselves that the claimant listed said property for taxation at the last listing time, if said property was then owned by him. This proviso shall apply only to Clarion county.] And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the amount paid out for such injury or destruction. To enforce collection of this amount the county commissioners are hereby authorized and empowered to sue for the same.

[*Provided, however*, no amount shall be paid out under the terms of this act, except upon the findings of three freeholders appointed to ascertain the amount of damages done, expense of treatment, and necessary expenses incurred, and in no event shall the amount allowed be more than the doctor's bill, including medicine and treatment, and the actual loss of time based upon the earning capacity of the person injured, including reasonable expense of travel to the place of treatment, and if injury to property, the actual damage suffered; but this proviso will apply only to Rockingham County.] [Provided further that this section shall not apply to Davidson county.] (1919, c, 116, s. 7; 1925, cc. 15, 25, 79.)

**In General.**—This section is a police regulation not estopping the defendant in the county's action from establishing any defense available to him under the pleadings, nor does it change the method of procedure as to the burden of proof, or otherwise, except that it limits recovery of the injured person, electing to proceed under this statute, to a sum not exceeding the amount thereunder ascertained. *Board v. George*, 182 N. C. 414, 109 S. E. 77.

**Constitutional.**—This section does not deprive defendant of jury trial and it is constitutional. *Board v. George*, 182 N. C. 414, 109 S. E. 77.

**Right to Trial by Jury.**—The ascertainment of damages by three disinterested freeholders, etc., caused by injury to person or property by any dog, upon satisfactory proof, etc., and the payment thereof by county commissioners from the dog taxes, with the right of the county to sue to recover the amount so paid from the owner of the dog if known or discovered, as provided by this section, reserves to such owner the right to a trial by jury in the action of the commissioners, and does not permit recovery in excess of the sum awarded for the damages caused as ascertained under the provisions of the statute. *Board v. George*, 182 N. C. 414, 109 S. E. 77.

**Testimony of Nonexpert Witness.**—Where the time that has elapsed between the death and discovery of sheep is relevant to the inquiry in the county's action against the owner of the dog to recover damages it has paid, under this section, testimony of the judgment of a nonexpert witness upon the personal observation of the carcass of the sheep, as to the length of time it had been killed, is not erroneous as the expression of a theoretical or scientific opinion. *Board v. George*, 182 N. C. 414, 109 S. E. 77.

**Cost of Assessment.**—In an action by the county to recover damages to the person or property sustained by the dog of another, under this section, the reasonable cost of the services of the persons chosen to make the assessment, and paid by the county, is a part of the money paid on account of the injury or destruction caused by the dog, and defendant's exception thereto will not be sustained. *Semble*, the question



of the reasonableness of this amount is a question for the jury, when aptly and properly raised and presented. *Board v. George*, 182 N. C. 414, 109 S. E. 77.

**§ 1684 (a). Counties excepted from operation of article.**

This article shall not apply to the counties of Haywood, Yancey, [Alexander] Cherokee, Madison and Jackson. All dog taxes collected in said counties and not disbursed on February 27, 1923, shall be prorated among those having bona fide claims against said fund, and the balance, if any, paid over to the school fund of the county. (1923, c. 84, ss. 2, 3; 1924, c. 14.)

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## CHAPTER 32

### **ELECTRIC, TELEGRAPH AND POWER COMPANIES**

#### **ART. 1. ACQUISITION AND CONDEMNATION OF PROPERTY.**

**§ 1698. Grant of eminent domain; exception as to mills and water-powers.**

Such telegraph, telephone, electric power or lighting company shall be entitled, upon making just compensation therefor, to the right of way over the lands, privileges and easements of other persons and corporations, and to the right to erect poles and towers, to establish offices, and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, railroads, or sidetracks, or power-houses, with the right to divert the water from such ponds or reservoirs and conduct the same by flume, ditch, conduit, waterway or pipe line, or in any other manner, to the point of use for the generation of power at its said power-houses, returning said water to its proper channel after being so used: Provided, that the provision as to erection of towers shall not apply to any suit pending March 4, 1921, in any of the courts within the state of North Carolina. Nothing in this section authorizes interference with any mill or power plant actually in process of construction or in operation; or the taking of water-powers, developed or undeveloped with the land adjacent thereto necessary for their development: *Provided, however*, that if the court, upon filing of the petition by such electric power or lighting company, shall find that any mill, excepting cotton mills now in operation, whether operated by water-power or otherwise, together with the lands and easements adjacent thereto or used in connection therewith, or that any water-power, developed or undeveloped, with land adjacent thereto necessary for its development, excepting any water-power, right or property of any person, firm or corporation engaged in the actual service of the general public where such water-power, right or property is being used or held to be used or to be developed for use in connec-

tion with or in addition to any power actually used by such person, firm or corporation serving the general public, is necessary for the development of any hydro-electric power plant which is to be operated for the purpose of generating electric power for sale to the general public, and that said electric power or lighting company is unable to agree for the purchase of such property with the owners thereof, and that the failure to acquire such property will affect the ability of such electric power or lighting company to supply power to the general public, and that the taking of such mill or water-power will be greatly more to the benefit of the public than the continued existence of such mill or the continuation of the existing ownership of such water-power, then the court, upon such finding, shall make an order authorizing the condemnation of such property and easements in all respects as in the case of other property referred to in this section:] *Provided*, that the portion of this section in brackets shall not affect pending litigation. Any provisions in conflict with this chapter in any special chapters granted before January thirty-first, one thousand nine hundred and seven, in respect to the right of eminent domain are repealed. (Rev., s. 1733. Code, s. 2009; 1874-5, c. 203; 1899, c. 64; 1903, c. 562; 1907, c. 74; 1921, c. 115; 1923, c. 60; 1925, c. 175.)

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## CHAPTER 33

### EMINENT DOMAIN

#### ART. 1. RIGHT OF EMINENT DOMAIN

#### § 1706. By whom right may be exercised.

The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporations, or persons following:

1. Railroads, street railroads, plankroad, tramroad, turnpike, canal, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

2. Municipalities operating water systems and sewer systems and all water companies operating under charter from the state or license from municipalities, which may maintain public water supplies, for the purpose of acquiring and maintaining such supplies.

3. Persons operating or desiring to operate electric light plants, for the purpose of constructing and erecting wires or other necessary things.

4. Public institutions of the state for the purpose of providing water supplies, or for other necessary purposes of such institutions.



5. School committees of public school districts, public school committees of townships, county boards of education, boards of trustees or of directors of any corporation holding title to real estate upon which any public school, private school, high school, academy, university or college is situated, in order to obtain a pure and adequate water supply for such school, college or university.

[6. North Carolina Fisheries Commission.]

7. Any educational, penal, hospital or other institution incorporated or chartered by the state of North Carolina, for the furtherance of any of its purposes, such institution being wholly or partly dependent upon the state for maintenance, and such institution shall be in need of land for its location, or such institution shall be in need of adjacent land for necessary enlargement or extension, or for land for the building of a road or roads or a side-track for railroads, necessary to the proper operation and completion of any such institution, and shall so declare through its board of directors, trustees or other governing boards by a resolution inserted in the minutes at a regular meeting or special meeting called for that purpose, such institution shall have all the powers, rights and privileges of eminent domain given under this chapter, to condemn and procure such land, and shall follow the procedure established under this chapter. (Rev., s. 2575; Code, s. 1698; R. C., c. 61, s. 9; 1852, c. 92, s. 1; 1874-5, c. 83; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; 1923, c. 205; 1924, c. 118.)

**In General.**—The right of a corporation to condemn lands for a public use, having the statutory powers, is not affected or impaired because in the charter it may be given rights of a more private nature to which the right of condemnation may not attach. *Mountain Retreat Ass'n v. Mount Mitchell Develop. Co.*, 183 N. C. 43, 110 S. E. 524.

**Right of Selection.**—In *Selma v. Nobles*, 183 N. C. 322, 325, 111 S. E. 453, the court said:—"In construing this legislation, the Court has held that where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law."

**The taking of private lands for turnpike or toll-road purposes** is for a public use, and may be acquired for such purposes by proper proceedings before the clerk of the court of the appropriate county under the provisions of this section et seq., when the corporation has been organized under the provisions of our general incorporation law. C. S., 1113 et seq., and, has express charter powers to do so. *Mountain Retreat Ass'n v. Mount Mitchell Develop. Co.*, 183 N. C. 43, 110 S. E. 524.

**What Constitutes Waiver.**—Where a city is sued for damages for running its water-supply pipe on the plaintiff's lands, and it is made to appear that the pipe land is upon the State's highway over the plaintiff's land, the plaintiff, as the dominant owner, may maintain his action, and the denial of this title or right by defendant is a waiver of its right that the plaintiff should have proceeded before the clerk under this section; and the plaintiff may maintain his action of trespass in the Superior Court. *Rouse v. Kinston*, 188 N. C. 1, 123 S. E. 482.

## § 1708. Power of railroad companies to condemn land for union depots, double tracking, etc.

**Right of Access to Union Depot.**—This section confers upon any railroad company the right to condemn land for the purpose of getting to a union depot required by the order of the Corporation Commission to be built. *State v. Railroad Co.*, 185 N. C. 435, 117 S. E. 563.

## § 1714. Dwelling-houses and burial grounds cannot be condemned.

The creation and maintenance of a nuisance which sensibly impairs the value of lands of private owners is a taking within the principle of eminent domain and condemnation proceedings thereunder, and within the exception contained in this section, withdrawing dwellings from the effect of the statute. *Selma v. Nobles* 183 N. C. 322, 111 S. E. 543.

**Municipal Corporations.**—Where a city, under its charter, is given the same power to condemn lands of private owners for municipal purposes that is given to railroads and other public utilities, it is bound by the restrictions placed on them by this section which provides that such power shall not extend, among other things, to dwellings, without the consent of the owner; and the principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543.

### ART. 2. CONDEMNATION PROCEEDINGS

## § 1715. Proceedings when parties cannot agree.

See notes to § 3667.

## § 1720. Answer to petition; hearing; commissioners appointed.

Where issuable matters are raised before the clerk in proceedings to condemn the lands of private owners for a public use, the clerk should pass upon these matters presented in the record, have the land assessed through commissioners, as the statute directs, allowing the parties, by exceptions, to raise any question of law or fact issuable or otherwise to be considered on appeal to the Superior Court from his award of damages, as provided by law. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543.

Under the method of procedure in the condemnation of lands for a public use, it was held, that issuable matters raised by the parties should be taken advantage of by exceptions, and the entire record sent up to the Superior Court by the clerk, where all exceptions may be presented, the rights of the parties may be protected meantime from interference by injunction issued by the judge on application made in the cause, and in instances properly calling for such course. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543.

**Attempt by Owners to Obtain Injunction.**—Where it is properly made to appear from the petition in proceedings to condemn lands of private owners for the purpose of a turnpike road, brought before the clerk of the court of the proper county, that the petitioner is a duly incorporated company, having the right of eminent domain, and the proceedings are in conformity with the statute as to the termini, route of the proposed road, etc., an attempt by such owners to obtain an injunction by independent action is, in effect, an erroneous effort to obtain a writ of prohibition restraining the clerk of the court from exercising the jurisdiction conferred exclusively on him by statute, cognizable only in the Supreme Court, it being required that the want of authority of the petitioner to condemn



the land and be taken by answer in the proceedings before the clerk, under this section, and the action will be dismissed. *Mountain Retreat Ass'n v. Mount Mitchell Develop. Co.*, 183 N. C. 43, 110 S. E. 524.

### § 1721. Powers and duties of commissioners.

**Measure of Damages.** — In condemnation proceedings the measure of damages is not the difference between the value of the owner's property before and after the taking, but the fair value of the land taken reduced by any special benefits received. *Stamey v. Burnsville*, 189 N. C. 39, 126 S. E. 103.

"A citizen must surrender his private property in obedience to the necessities of a growing and progressive state, but in doing so he is entitled to be paid full, fair and ample compensation, to be reduced only by such benefits as are special and peculiar to his land. He has the right to have and enjoy the general benefits which are common to him and to his neighbors, without being required to pay therefor because it so happens that the use of his land is necessary for the needs of the public." *Stamey v. Burnsville*, 189 N. C. 93, 126 S. E. 103, 105.

**Same—Assessing General Benefits.**—The Legislature has the power to allow municipal corporations to have the general benefits assessed as off-sets against damages in an action to acquire land for a public purpose. But the power or authority must be given either by special charter or general state act. *Stamey v. Burnsville*, 189 N. C. 39, 126 S. E. 103, 104.

**Same—"Just Compensation."**—"It seems to be the general rule in this jurisdiction that 'the compensation which ought justly to be made,' 'just compensation,' under our general statute is such compensation after special benefits peculiar to the land are set off against damages. 'The value of the land subject to such special benefits as may accrue to the remainder of the tract.'" *Stamey v. Burnsville*, 189 N. C. 39, 126 S. E. 103, 104.

### § 1723. Exceptions to report; hearing; appeal; when title vests; restitution.

**Appeal Premature Before Judgment of Board.**—In *In re Baker*, 187 N. C. 257, 258, 121 S. E. 455, the Court said:—"There was no trial, judgment of condemnation or affirmation in this case by the town of Ahoskie or in the Superior Court. There was a proceeding begun for condemnation and a report of the commissioners appointed, that they thought that the condemnation should be made and that the value of the property was \$1,250. An appeal was taken from this in October, 1919, but it was premature for there was no judgment of the board from which the appeal could be taken."

### § 1724. Provision for jury trial on exceptions to report.

**Municipal Corporations.**—Where the charter of a city or town provides for condemning lands of private owners for cemetery purposes in the manner prescribed for condemnation thereof for street or other purposes, without specific provision for appeal in conformity with the constitutional due-process clause, under the general statute (this section), applying to municipal corporations, this right of appeal is preserved, and the charter provisions of the city or town will not be declared for that reason unconstitutional by the courts. *Long v. Rockingham*, 187 N. C. 199, 121 S. E. 461.

## CHAPTER 34

## ESTATES

## § 1734. Fee tail converted into fee simple.

See notes to § 1737.

**Rule in Shelley's Case**—"Heirs" or "Heirs of Body."—In order to an application of the rule in Shelley's case appreciation of the words "heirs" or "heirs of the body" must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument. *Wallace v. Wallace*, 181 N. C. 158, 106 S. E. 501.

**Same—Fee Simple.**—A limitation coming within the rule in Shelley's case, recognized as existent in this State, operates as a rule of property, passing when applicable a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument. *Wallace v. Wallace*, 181 N. C. 158, 106 S. E. 501.

A devise of lands to the testator's named children "for life only and then to their body heirs," falls within the rule in Shelley's case, notwithstanding the use of the words "for life only," and carries to the remainderman a fee tail under the old law, converted by our statute into a fee-simple title. *Harrington v. Grimes*, 163 N. C. 76, 79 S. E. 3301, cited and applied. *Merchants Nat. Bank v. Dortch*, 186 N. C. 510, 120 S. E. 60.

**An estate in remainder** to the testator's son "and to his children or issue," there being no child or children of the son until long after the testator's death, it was held, that to create an estate tail at common law, which is converted into a fee-simple by this section and where there is an ultimate limitation over to persons coming within its terms, the testator's son and his child or issue cannot convey a fee-simple title. *Ziegler v. Love*, 185 N. C. 40, 115 S. E. 887.

An estate to H. during her life, with remainder to the testator's son "and his bodily heirs," vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. And upon the falling in of the life estate, the son can convey a good fee-simple title. *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111; *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657, cited and distinguished. *Howard v. Edwards*, 185 N. C. 604, 116 S. E. 1.

## § 1735. Survivorship in joint tenancy abolished; proviso as to partnerships.

**Estate by Entireties Sold upon Joint Judgment.**—In *Martin v. Lewis*, 187 N. C. 473, 122 S. E. 180, the Court said:—"The estate by entireties was not created, either in England or in this State, by any statute, and it has been contended that it was abolished by our statute in 1784, now this section, converting all joint estates into tenancy in common, and still more so by the constitutional change (Article X, sec. 6), conferring upon a married woman the same rights in her property 'as if she had remained single.' By reason of similar statutes, or statutes especially repealing the estate by entireties, that anomalous estate has disappeared in all but a very few States in this country, and in them, as above said, there is no case to be found which does not hold that upon a joint judgment against husband and wife the estate by entirety can be sold."

## § 1737. Limitation on failure of issue.

**Intention of Testator to Create Absolute Estate.**—In *Goode v. Hearne*,



180 N. C. 475, 478, 105 S. E. 5, it was said: The testator here, by express declaration, makes a certain clause the controlling provision, and the limitation over, "if the children survive the mother," by correct construction refers to a survival by death occurring during the life of the testator. In estates of this kind, where the devise over is on the death of the first taker without "heir or heirs of the body, or without issue or issues of the body," etc., this section provides that such a limitation shall be held and construed to take effect when such a person shall die, not having such heir or issue, etc., living at the time of his death, or born within ten luna months thereafter, unless the intention be otherwise and expressly and plainly disclosed on the face of the deed or will creating it. Under this section and authoritative decisions construing the same, *Patterson v. McCormick*, 177 N. C. 448, 99 S. E. 401; *Kirkman v. Smith*, 175 N. C. 579, 96 S. E. 51, and others, some of the earlier cases discussing the general principles of interpretation have been changed or very much modified, but their application is unaffected where, as in this case, the devise does not come under the purport and meaning of the statute, and where, in any event, it clearly and plainly appears to be the intent of the testator on the face of the will that the estate of the first taker shall become absolute at his death.

**Where an estate is granted to M., and the heirs of her body** in the premises, with warranty to her and the heirs of her body, it was held, that the intent of the grantor by proper construction was to limit over the estate to M. in case she should die without issue or bodily heirs. *Willis v. Mutual Loan, etc., Co.*, 183 N. C. 267, 111 S. E. 163.

An estate to M. and her bodily heirs is converted into a fee simple under our statute, C. S., 1734, without further limitation, but followed by the words "if no heirs, said lands shall go back to my estate," the estate will go over to the heirs of the grantor at the death of M., upon the nonhappening of the event as a shifting use under the statute of uses, 27 Henry VIII, ch. 10; 1740, whereunder a fee may be limited after a fee, by deed, and under the provisions of this section that every contingent limitation in a deed or will made to depend upon the dying of any person without heir or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. *Willis v. Mutual Loan, etc., Co.*, 183 N. C. 267, 111 S. E. 163.

**An estate to testator's daughter N. for life, and to the lawful heirs of her body**, creates an estate tail converted by our statute into a fee simple; and a further limitation "and if she should die leaving no heirs, then the lands to return to the G. family," gives N. a fee defeasible upon her death without issue, children, etc., under this section and on her death, leaving children surviving, they take an unconditional fee, and can make an absolute conveyance thereof. *Vinson v. Gardner*, 185 N. C. 193, 116 S. E. 412.

## § 1738. Unborn infant may take by deed or writing.

**Remainder After Freehold Conveyed—Children Not in Esse.**—Where there is a deed to lands to an unmarried grantee for life, with remainder to his children, not then in esse, the first taker holds the legal title until the birth of children after his marriage, at which time such estate becomes vested, such remainder being contingent until the birth of a child during the existence of the freehold estate, and then vests in such child or children who would then take and hold the interest. *Johnson Bros. v. Lee*, 187 N. C. 753, 122 S. E. 839.

## § 1739. "Heirs" construed "children" in certain limitations.

The rule in *Shelley's case* is not affected by this section. *Hartman v. Flynn*, 189 N. C. 452, 127 S. E. 517.

**Devise to "Heirs of His Children."**—By his will, the testator devised

the vacant lot to the trustees for 20 years from the date of his death, and at the expiration of such term to the "heirs of his children, to be equally divided between them, per stirpes." The testator left surviving two children, a son and a daughter, both of whom had children living at the date of testator's death. The son and daughter are now living. Under this section the word "heirs," used in item 11 of the will, must be construed to mean "children." *Lide v. Wells* (N. C.), 128 S. E. 477, 480.

## § 1742. Spendthrift trusts.

**Restricted as to Amount and Duration.**—In *Bank v. Heath*, 187 N. C. 54, 64, 121 S. E. 24, the court said: "A perusal of the law will disclose that such trusts are only permissible for a restricted amount, 'an annual income not to exceed \$500 net,' and by correct interpretation to be applied to the support of the beneficiary for his life only." Because of the limitations mentioned this section does not apply to the instant case.

## § 1743. Titles quieted.

**This section is highly remedial.** *Plotkin v. Bank*, 188 N. C. 711, 715.

This is a remedial statute which has been liberally construed quieting land titles, more comprehensive than the old suit in equity to remove a cloud from title. *Jacobi Hdw. Co. v. Jones Cotton Co.*, 188 N. C. 442, 445 124 S. E. 756.

This section and the amendatory acts thereto being remedial in nature, should have a liberal construction in order to execute fully the legislative intention and will. *Stocks v. Stocks*, 179 N. C. 285, 289, 102 S. E. 306.

**Scope and Purpose.**—The language of this section is broad and liberal, showing the purpose of the General Assembly to permit any person to bring an action against another who claims an interest or estate in real property adverse to him. *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 715, 125 S. E. 541.

In *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 715, 125 S. E. 541, the court said: "Walker, J., in *Christian v. Hilliard*, 167 N. C. 4, speaking of the statute, says: 'The beneficial purpose of this statute is to free the land of the cloud resting upon it and make its title clear and indisputable so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion.'"

In *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 715, 125 S. E. 541, the Court further said: "In *Rumbo v. Mfg. Co.*, 129 N. C. 10, Clark, C. J., says: It was because the General Assembly thought the equitable doctrines (as laid down in *Busbee v. Macy*, 85 N. C. 329, and *Busbee v. Lewis*, *ibid.*, 332, and like cases) inconvenient or unjust that the act of 1893 (this section) was passed."

This section giving the owner of lands the right to remove a cloud upon his title, is much broader in its scope and purpose than the equitable remedy theretofore allowed and administered in this State, and includes not only the right to remove an apparent lien under a docketed judgment, but also the potential claim of a wife to her inchoate right of dower in her husband's lands. *Southern State Bank v. Summer*, 187 N. C. 762, 122 S. E. 848.

**What Estate or Interest Necessary.**—The contention that a plaintiff in an action brought under this section must allege and prove that at the commencement of the action and at its trial he had an estate in or title to the land, cannot be sustained. It is only required that he have such an interest in the land as that the claim of the defendant is adverse to him. *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 715, 125 S. E. 541.

Where the owner of lands in possession thereof or entitled thereto



brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest, C. S., 446, without claim of the right to the possession, under the provisions of this section; and where issue has been joined, he may, if successful, recover his costs. *Plotkin v. Merchants Bank, etc., Co.*, 188 N. C. 711, 125 S. E. 541.

**Invalid Judgment as Cloud.**—A judgment, if invalid, would be such a cloud on the title, or such a direct menace to it, as to fall within the provisions of this section. *Stocks v. Stocks*, 179 N. C. 285, 289, 102 S. E. 306.

**Same—Judgment Obtained by Fraud.**—The complaint in this suit alleged, in effect, that the plaintiff had her dower laid off in the lands of her deceased husband, in which the defendant, her son, was properly represented, and thereafter the son, without the service of summons upon her, instituted an independent proceeding to annul the judgment, and falsely represented to her that the action had been withdrawn, and that she should not further consider it, and in consequence, and through his false representation, obtained a judgment in his favor, destroying her dower right, it is held, sufficient for her to maintain an independent action to set aside the former judgment upon the issue of fraud, and also our statute to remove the former judgment as a cloud upon her title. *Stocks v. Stocks*, 179 N. C. 285, 102 S. E. 306.

**Proof Required of Plaintiff.**—In a suit to remove a cloud upon the plaintiff's title, this section, the defendant claimed under a sale by foreclosure of a mortgage which the plaintiff attacked for fraud. It was held, that the burden of proof was on the plaintiff to show the fraud by the preponderance of the evidence, and not by clear, strong and cogent proof as required in the information or correction of a conveyance of land. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207. See notes of this case under section 687.

**Costs.**—Where the defendant disclaims title to lands in a suit to remove a cloud thereon, the plaintiff is chargeable, with the costs under the express provisions of this section. *Clemmons v. Jackson*, 183 N. C. 382, 111 S. E. 609.

In an action for trespass and for damages the plaintiff, after trial of issues as to trespass, etc., may not abandon these contentions upon the trial, and have the court consider the action as an equitable one to remove a cloud upon the title, and so avoid the payment of the full amount of the costs incident to the litigated issues. *Clemmons v. Jackson*, 183 N. C. 382, 111 S. E. 609.

## § 1744. Remainders to uncertain persons; procedure for sale; proceeds secured.

In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other civil actions, as provided by section 479, and service of summons

upon nonresidents, or persons whose names and residences are unknown, by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided.

The clerk of the superior court is authorized to make all orders for the sale of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales, but no sale under this section shall be held until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in coupon [or registered] bonds of the United States of America (commonly called Liberty Bonds) issued incident to the late war between the United States and the Imperial German Government [or bonds of the State of North Carolina issued since the year one thousand eight hundred and seventy-two]; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and



the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in liberty bonds [or State bonds] heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid. (Rev., s. 1590; 1903, c. 99; 1905, c. 548; 1907, cc. 956, 980; 1919, c. 17; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281.)

See note to § 3218.

**Editor's Note.**—In addition to the changes indicated by the brackets in the last paragraph of this section, a phrase, "and evidenced by the coupons attached to," was stricken out. This was in conformity with the addition of "or registered" near the first of the last paragraph.

**Purpose of Section.**—It was not the purpose of this section to destroy the interest of the remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, and to require that the proceeds be held as a fund, subject to the claims of persons who may ultimately be entitled thereto, and safeguard their rights in all respects. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323.

**Applied to Charitable and Other Trusts.**—Courts, in the exercise of general equitable jurisdiction, may, in proper instances, decree a sale of estates in remainder and affected by contingent interests, for reinvestment, or a portion thereof, when it is shown that it is necessary for the preservation of the estate and the protection of its owners; and this principle is not infrequently applied in the proper administration of charitable and other trusts, notwithstanding limitations in instruments creating them that apparently impose restrictions on the powers of the trustee in this respect, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. *Middleton v. Rigsbee*, 179 N. C. 437, 441, 102 S. E. 780.

The sale of an estate in remainder affected under the terms of a will with certain ultimate and contingent interests in trust will not be affected by a clause in the will requiring that the principal of the trust fund shall not be used or diminished during the period of thirty years, with a certain exception, the limitation applying only to the administration of the trust estate, and not preventing the court from ordering a sale when required by the necessities of the estate for its preservation. *Middleton v. Rigsbee*, 179 N. C. 437, 441, 102 S. E. 780.

**Applied to Sale of Growing Timber.**—The timber growing upon lands devised to the testator's named daughter for her sole and separate use during her life only, and at her death to such of her children and grandchildren then living as she may have appointed in her will, and upon her failure to have done so, to her children and grandchildren then living, during the life of the daughter, is affected by the contingencies contemplated by this section. *Midyette v. Lycoming Timber, etc., Co.*, 185 N. C. 423, 117 S. E. 386.

**Same—Necessary Parties.**—Where such devisee and her living children and grandchildren have brought proceedings to have the timber on the lands affected with contingent interest sold for reinvestment, pursuant to this section, amended in 1923, valid objection that no one having a vested interest in the lands had been made a party cannot be sustained. *Poole v. Thompson*, 179 N. C. 44; *Midyette v. Lycoming Timber, etc., Co.*, 185 N. C. 423.

**Authority of Clerk of Superior Court.**—It was not contemplated by this section that the rights of parties should be entrusted to the clerks of the Superior Court in ordinary special proceedings without approval or confirmation by a judge of the Superior Court. The section prescribes

the method in which there shall be a sale decreed when there is a contingent remainder and requires a decree for proper investment of the funds of remaindermen. *Ray v. Poole*, 187 N. C. 749, 751, 123 S. E. 5.

A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of C. S., 3215, and these proceedings so brought cannot be validated by derivative jurisdiction in the Superior Court, on appeal, under the provisions of this section, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements, for the protection of contingent remaindermen, which must be strictly followed; and, though under C. S., 3234, 3235, a sale is provided when the land is affected with contingent interest in remainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants. *Ray v. Poole*, 187 N. C. 749, 123 S. E. 5.

**Public or Private Sale Permissible.**—The sale of estates affected with contingent interests, made under the provision of this section, may, in the sound discretion of the trial judge, and subject to the approval, be sold either at public auction or by private negotiation, as the best interests of the parties may require. *Middleton v. Rigsbee*, 179 N. C. 437, 102 S. E. 780.

Where the sale of land affected with remote contingent interests not ascertainable at the time, comes within the provisions of this section, the court having jurisdiction may order the property disposed of either at a public or private sale, when it is shown that, as to the one or the other, the best interests of the parties will be promoted, subject always to the approval of the court. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323.

Where the provisions of this section, and amendments of 1923, have been observed in the sale of lands affected with contingent interests, the commissioner appointed to make the sale may effect the same by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interests of the parties so require. *Midyette v. Lycoming Timber, etc., Co.*, 185 N. C. 423, 117 S. E. 386.

**Bond—Effect of Omitting.**—In all cases where property affected with unascertainable contingent remainders is ordered sold under the provisions of this section, it is now required by the amendatory act of 1919, chapter 17 and 259, that a bond be given to assure the safety of the funds arising from the sale; but where this is omitted from a judgment otherwise regular, it will not affect the title conveyed, though the decree should be modified in that respect by proper steps taken in the Superior Court. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323.

**Same—Supplementary Decree.**—Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc. (Laws 1919, ch. 259); but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. *Midyette v. Lycoming Timber, etc., Co.*, 185 N. C. 423, 117 S. E. 386.

**General Applications and Illustrations.**—Where lands are affected with a contingent interest in remainder, not determinable during the life of the tenant for life, the holder of the vested interest and those in immediate remainder may proceed to have the lands sold under the provisions of this section, and have those remotely interested represented by guardian ad litem for the protection of their interests; and where it is made



to appear that the interest of all parties require, or will be materially enhanced by it, the court may order a sale of the property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies in like manner as the property ordered to be sold. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323.

Where the present owners of land for life and in remainder have attempted to convey a fee-simple title to lands affected with remote contingent interests, without resorting to the proceedings allowed by this section, which were applicable to the transactions, and thereafter these proceedings are properly brought, having the guardian ad litem appointed, as required, and the petition filed sets forth the sale previously made, the entire investment realized and held from the proceeds thereof, and subjects such investments and their ownership and control to the orders and judgment of the court in the cause, and allege and show that the sale was for the full value of the property, highly advantageous to all parties in interest, and that in fact it was necessary owing to liens for taxes, assessments, etc., on the land, it was held, the court having jurisdiction of the parties and the property may enter a valid judgment confirming and authorizing the sale, and directing that the fund be properly safeguarded and invested, and the remote contingent interests safeguarded as the statute requires. *Poole v. Thompson*, 183 N. C. 588, 112 S. E. 323.

Where the grantors in a deed have erroneously assumed that they had title to the lands they conveyed in fee, but which was affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of this section, which authorizes the sale of land affected by such contingencies, and in these proceedings have protected the interests of the remote remainderman by the appointment for them of a guardian ad litem, and have fully set forth the facts and circumstances of the former sale, and bring in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment properly authorizing and confirming the sale, and being had in conformity with the provisions of the statute, perfects the title and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant only nominal damages are recoverable. *Meyer v. Thompson*, 183 N. C. 543, 112 S. E. 328.

A testator devised his improved and unimproved lands, in the corporate limits of a town, to his daughter for life with remainder to her children living at her death, with ulterior limitations over to trustees on certain contingencies, and the life tenant brought proceedings for sale and reinvestment of the proceeds under the provisions of this section, having made parties of the persons interested in accordance with the statute, and alleged that by the sale the income would be largely increased, that the sale of the contemplated part to a purchaser she had secured for a certain price would meet the demands of the town for conformity with its certain health regulations as to the removal of surface privies, should enable her to make improvements on the land then without income, to make houses on other parts of the land more profitable for rental purposes, etc.; that the property as it stood was rapidly depreciating, and there were no available funds, otherwise, to meet the necessary and insistent demands. Held, a demurrer was bad, and properly overruled. *Middleton v. Rigsbee*, 179 N. C. 437, 102 S. E. 780.

This proceeding in which the order for the sale of the said lot has been made was not instituted and has not been conducted in accordance with this section. The power of sale has not been exercised by virtue of the statute. The proceeding was brought before the clerk, and not in term. The minors are not represented by guardians ad litem appointed by the judge, but by a next friend appointed by the clerk. The order of sale

was signed, not during the term of the superior court in Haywood county, but by the judge holding the courts of the twentieth district (which includes Haywood county) at Sylva, in Jackson county, in said district. The order of sale cannot therefore be held valid, because made under the power conferred upon the superior court. *Lide v. Wells*, (N. C.), 128 S. E. 477, 480.

### § 1745. Sales of contingent remainders validated.

This section does not authorize or validate a partition sale at the instance of a life tenant against vested remaindermen, who are not infrequently children. *Ray v. Poole*, 187 N. C. 749, 751, 123 S. E. 5.

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## CHAPTER 35

### EVIDENCE

#### ART. 1. STATUTES

### § 1750. Town ordinances certified.

**When Certification Unnecessary.**—The certification of a town ordinance as required by this section, is only prima facie evidence of its existence, and this is unnecessary when the ordinance has been proven by the production of the official records of the town by the proper officer, which shows its passage. *State v. Razook*, 179 N. C. 708, 103 S. E. 67.

#### ART. 4. OTHER WRITINGS IN EVIDENCE

### § 1783. Parol evidence to identify land described.

**When Description Sufficient.**—A description of land in a deed, all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. *Buckhorn Land, etc., Co. v. Yarbrough*, 179 N. C. 335, 102 S. E. 630.

### § 1784. Proof of handwriting by comparison.

**In General.**—The principle, formerly recognized in this State, that confined the proof of handwriting to the testimony of a competent witness in comparing that sought to be established with handwriting either admitted or proven as that of the party, has been changed by this section, and where the disputed writing has been rendered competent under this principle, it may now be submitted to the jury, together with that admitted or proven since 5 March, 1913. *Newton v. Newton*, 182 N. C. 54, 108 S. E. 336.

**Analogy to Proof of Agency.**—In *Newton v. Newton*, 182 N. C. 54, 55, 108 S. E. 336, the court said: "As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The Court determines whether there is prima facie evidence of agency or of the genuineness of writing admitted as a basis of comparison, and then the testimony of the witnesses and 'the writing' (in the plural) themselves are submitted to the jury. It is fair to the pre-



siding judge to say that this statute was not called to his attention. It was adverted to by Walker, J., in *Bank v. McArthur*, 168 N. C. 55, though the disputed writing in that case did not come within the statute."

**Handwriting Irrelevant—Exclusion Harmless Error.**—In this case the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, and the action of the court in refusing to let the writing be submitted to the jury, to determine its genuineness, under the statute, was harmless error. *Newton v. Newton*, 182 N. C. 54, 108 S. E. 336.

**Illustration.**—Where relevant to the inquiry in a criminal action for the stealing of an automobile to show that the accused was present in a certain city at the time thereof, which the defendant denied and has offered evidence to the contrary, it is competent for a witness to offer in evidence a leaf cut by himself from a hotel register indicating the name of the hotel and dates of registration of guests, with the surname of the accused entered thereon under the date of the commission of the crime, and to testify that it was a leaf from the hotel register then kept for the registration of guests, with an entry of one under the surname of the accused, but with different initials, and, under this section, for experts in handwriting, by comparison, to testify their opinion that the person who made the entry on the hotel register was the same as the one who signed certain papers introduced upon the trial and admitted to be in the handwriting of the accused. *State v. Hendricks*, 187 N. C. 327, 121 S. E. 603.

### § 1786. Book accounts under sixty dollars.

**Unverified Entries on Own Book.**—A party to an action may not show unverified entries of credit in his behalf on his own books involved in a disputed account, the same not falling within the intent and meaning of this section and sections 1787, 1788, especially when it has not been made to appear that the person having made them is dead or cannot be had to give his sworn statement of the transaction. *Branch v. Ayscue*, 186 N. C. 219, 119 S. E. 201.

### § 1789. Itemized and verified accounts.

**Subordinate to Section 1795.**—In *Lloyd & Co. v. Poythress*, 185 N. C. 180, 184, 116 S. E. 584, the Court said: "We have held that this section, appearing as a section on the law of evidence, should be construed in subordination to C. S., 1795, under the principal announced in *Cecil v. High Point*, 165 N. C. 431."

In an action by a corporation against the administratrix of the deceased to recover for goods sold and delivered to the intestate prior to his death, upon an affidavit attached to an account stated under the provisions of this section, making such evidence prima facie evidence of the correctness of the account in an action thereon, it is required where objection is raised that the one making the affidavit be qualified as witness to make the statement; and when he has made the affidavit as treasurer of the corporation it must be made to appear upon the face of the affidavit itself, or by evidence aliunde, that he was not disqualified for interest under the provisions of C. S., 1795, prohibiting testimony of transactions, etc., with a deceased person. *Lloyd & Co. v. Poythress*, 185 N. C. 180, 116 S. E. 584.

## ART. 5. LIFE TABLES

### § 1791. Present worth of annuities.

**Interest of Life Tenant in Land Sold by Mortgagee.**—Where the owner of lands has mortgaged the same during his life as tracts num-

bered 1 and 2, and has later conveyed tract No. 2 to a purchaser in fee simple, and has devised tract No. 1 for life with remainder over: Held, the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who may determine whether the surplus be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of this section, or the mortgagee may relieve himself of liability by paying the fund into the court. *Brown v. Jennings*, 188 N. C. 155, 124 S. E. 150.

#### ART. 6. COMPETENCY OF WITNESSES

### § 1792. Witness not extended by interest or crime.

**Beneficiary Under Holograph Will.**—Under this and the following section one who is a beneficiary under a holograph will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

### § 1795. A party to a transaction excluded, when the other party is dead.

**Purpose of Section.**—The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event as to a personal transaction or communication between witness and the deceased person whose lips are sealed in death. *Abernathy v. Skidmore* (N. C.), 128 S. E. 475, 476.

**Personal Transaction within Meaning of Section.**—This section does not apply to the testimony of an interested witness as to a conversation between her deceased father and a living defendant. This is not testimony "concerning a personal transaction." *Abernathy v. Skidmore* (N. C.), 128 S. E. 475.

**What Constitutes Interest in Result.**—Where defendant's liability depends upon whether he was a member of defendant partnership at the time the firm contracted a debt with the plaintiff, the subject of the action, who has since died and his administrator has been made a party to the action, a witness who was not a member of the firm is not such person interested in the result as would exclude his direct testimony, under the provisions of this section as to the payment to his own knowledge by deceased of the partnership debts. *Herring v. Ipock*, 187 N. C. 459, 121 S. E. 758.

**Section 1789 Subordinate to This Section.**—See notes of *Lloyd & Co. v. Poythress*, 185 N. C. 180, 184, 116 S. E. 584, under section 1789.

**When Section Waived.**—Where the defendant executor has testified as to certain matters relating to the identification of certain letters the deceased had written upon the question of whether he should be held liable as a partner for the debts of a firm, it is competent for the plaintiff's witness to testify in plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and this section prohibiting testimony as to transactions, etc., with a deceased person, does not apply. *Herring v. Ipock*, 187 N. C. 459, 121 S. E. 758.

**Application of Section.**—In an action to recover upon a note against the personal representatives of a deceased person, and others whose names appear thereon as joint principals, the admission in the pleadings that the others whose names appeared on the instrument as makers were in fact but sureties thereon, is incompetent as being a personal transaction, etc.,



with a deceased person, it being in the interest of those thus claiming it, and against that of the deceased; and these interests being conflicting, the fact that they were all parties defendant does not vary the rule. *Rudisill v. Love*, 186 N. C. 524, 120 S. E. 84.

Where a suit seeks to engraft on the title of the grantee in the deed to land a parol trust in favor of the plaintiff, upon condition that he pay the purchase price and receive the title, the grantor, after the death of the holder of the legal title, is incompetent as a witness in plaintiff's favor to testify to the facts relied upon by him, being the common source of title of the plaintiff and the deceased, under whom the defendant claims. *Sherrill v. Wilhelm*, 182 N. C. 673, 110 S. E. 95.

The wife may testify that she was not aware that her deceased husband had made a will until after his death, as substantive evidence, and it is not objectionable under this statute as being of a transaction with a deceased person. *In re Will of Bradford*, 183 N. C. 4, 110 S. E. 586.

Where the will of the deceased husband in favor of his wife is contested, she may testify as a substantive, independent fact, not prohibited by our statute, that excluding any dealings with her husband, she had nothing to do with his making the will, it being in effect that she did not procure it through third parties, though this may indirectly tend to prove a transaction with the deceased. *In re Will of Bradford*, 183 N. C. 4, 110 S. E. 586.

Where the widow of her deceased husband seeks in her suit to set aside an agreement of separation given upon consideration, and to dissent from his will, and it is controverted as a material matter whether they were reconciled before his death and lived together in the marital relations, letters received from her husband by others bearing thereon may be identified by the plaintiff as in the handwriting of the deceased, and introduced in evidence. *Satterthwaite v. Davis*, 186 N. C. 565, 120 S. E. 221.

A beneficiary under a will may testify as to the manner the deceased kept the paper-writing among his valuable papers. *In re Will of Harrison*, 183 N. C. 457, 111 S. E. 867.

A witness interested in the result of a trial of *devisavit vel non* as to whether the holograph will of the deceased was found among her valuable papers and effects after her death, with evidence that it had been securely wrapped in and fastened to some clothes supposed to have been put aside by her for her shroud, addressed in sealed envelope to three of the beneficiaries, her daughters, locked in her top bureau drawer where she was in the habit of keeping her purse and other effects, testify to the fact as being within her own knowledge, that the deceased was not in the habit of keeping this drawer locked all of the time, testimony of this character not being prohibited under this section as to transactions or communications with a deceased person. *In re Will of Harrison*, 183 N. C. 457, 111 S. E. 867.

## § 1798. Communications between physician and patient.

**In General.**—The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of this section, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry. *State v. Martin*, 182 N. C. 846, 109 S. E. 74. See notes of this case under section 4426.

## § 1799. Defendant in criminal action competent but not compellable to testify.

**Extent of Cross Examination Permitted.**—Cross examination of a defendant under this section is not confined to matters brought out on direct examination, but questions are admissible to impeach, diminish or impair the credit of the witness. *State v. Dickerson* (N. C.), 127 S. E. 256.

## § 1802. Husband and wife as witnesses in criminal actions.

**Husband May Testify against Wife in Assault.**—Conversely to the rule enunciated in this section, that a wife may testify against her husband in actions for assault against her, it appears that a husband may testify in assaults by the wife against him, and this was so held in *State v. Davidson*, 77 N. C. 522. *State v. Alderman*, 182 N. C. 917, 919, 110 S. E. 59.

In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats is not inadmissible under the provisions of this section, but is admissible for the purpose of showing knowledge and identifying the perpetrators of the crime, and is distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery. *State v. Alderman*, 182 N. C. 917, 110 S. E. 59.

**Failure of Wife to Appear and Testify.**—The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense, is expressly excluded as evidence to the husband's prejudice by this section, though she is competent to testify. *State v. Harris*, 181 N. C. 600, 107 S. E. 466.

Where the trial judge has properly excluded from the consideration by the jury testimony relating to the wife's failure to appear and testify in behalf of her husband on his trial for a homicide, the prisoner may not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there has been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject. *State v. Harris*, 181 N. C. 600, 107 S. E. 466.

Where a prisoner's wife, on his trial for a homicide, has failed to appear and be examined in her husband's defense, and a witness has testified to facts relating thereto, before the trial judge has had opportunity to rule upon the prisoner's objection, the reading of this section by the trial judge to the jury, and his telling them they must not consider this failure of the wife to appear as evidence to the prisoner's prejudice, renders the error harmless, if any was committed. *State v. Harris*, 181 N. C. 600, 107 S. E. 466.

## ART. 8. DEPOSITIONS

### § 1809. Manner of taking depositions in civil actions.

**Signatures.**—Since a deposition is not required to be signed, the fact that it was signed when neither party was present is not ground for refusing to admit it. *Riff v. Yadkin R. Co.*, 189 N. C. 585, 127 S. E. 588.

### § 1812. Depositions for defendant in criminal actions.

**Not Applicable to State Witnesses.**—In *State v. Harris*, 181 N. C. 600, 107 S. E. 466, Stacy, J., commenting on an offer of a trial judge to allow the defense to take depositions of State's witnesses, in a dissenting opinion said: "This section provides that the defendant, in all criminal actions, may take the depositions of witnesses to be used as evidence in his behalf. But this applies to his own witnesses and not to those who testify against him. It would be strange, indeed, to say that a statute, intended to grant, as it does, a privilege to the defendant, could be used to deprive him of his constitutional guarantees. As to the witnesses offered by the State, he has the right to demand their presence in the courtroom, and to confront them with other witnesses, and to subject them to the test of a cross-examination. *State v. Mitchell*, 119 N. C. 784, 25 S.



E. 783, 1020. The prisoner may not be required to examine the State's witnesses in the absence of the jury; and the contrary suggestion of his Honor, though unintentional, was prejudicial to the defendant." *State v. Harris*, 181 N. C. 600, 617, 107 S. E. 466.

#### ART. 9. INSPECTION AND PRODUCTION OF WRITINGS

### § 1823. Inspection of writings.

**Requisites to Obtain Order.**—To obtain an order for the inspection of papers, under this section, it is necessary for the party desiring their use to set forth the facts or circumstances in his affidavit from which their materiality and necessity may be seen by the court, and an allegation merely that an examination, etc., is material and necessary is but a conclusion of law of such party or his own opinion thereof, and is insufficient. *Burleson Mica Co. v. Southern Exp. Co.*, 182 N. C. 669, 109 S. E. 853.

**Failure to Designate Time.**—An order of the court under the provisions of this section and section 1824, for the inspection of papers by the adverse party to the action, or their necessity for being produced on the trial, is fatally defective when requiring them to be filed with the clerk of the court at a certain time and leaving them there indefinitely, beyond the control of the party to whom they belong, it being required that the order should either designate a certain time for their inspection by the applicant or produce them upon the trial, if a previous inspection of them is not desired. *Burleson Mica Co. v. Southern Exp. Co.*, 182 N. C. 669, 109 S. E. 853.

**Books Beyond State Limits.**—In this action against a corporation and its selling agent to compel the agent to account for and pay over to the corporation moneys received and unlawfully withheld from it: Held, the court having jurisdiction of the parties may order the examination, etc., of the books and papers, under this section, and enforce it by decree or appropriate procedure in the cause, though the books are in the possession of the adverse parties beyond the limits of the State. *Ross v. Robinson*, 185 N. C. 548, 118 S. E. 4.

**An appeal to the Supreme Court** presently lies to an order made by the Superior Court judge providing for examination and copies of books and papers in the possession of the adverse party to the action under the provisions of this section, and unless the statutory provisions have been complied with, or if the order goes beyond the powers contemplated and conferred by law, it will be set aside. *Ross v. Robinson*, 185 N. C. 548, 118 S. E. 4.

An appeal from an order of the Superior Court judge allowing examination of books, papers, etc., of the adverse party under the provisions of this section, cannot be maintained, when it appears from the record that it is frivolous and for the mere purpose of delay; and the appellee may docket the appellant's case and have it dismissed, under the rule of the Supreme Court relating to such matters. *Ross v. Robinson*, 185 N. C. 548, 118 S. E. 4.

## CHAPTER 37

**FISH AND FISHERIES****Subchapter I. Fisheries Commission Board Act****ART. 1. DEFINITIONS AND GENERAL PROVISIONS****§ 1865. Fish, fishing, fisheries, defined.**

As to taking escallops, see note to § 1878.

**ART. 2. FISHERIES COMMISSION BOARD; ORGANIZATION, OFFICERS, SUPPORT****§ 1870. Fish commissioner and assistant commissioners.**

Said board shall appoint a fisheries commissioner within thirty days after the passage of this act, and the said commissioner shall be responsible to the fisheries commission board for carrying out the duties of his office, and shall make semiannual reports to them at such time as they may require. The term of office of said commissioner and his successor in office shall be four years or until his successor is appointed and qualified, and in case of vacancy in the office the appointment shall be to fill the vacancy. The said commissioner may appoint [three] assistants by and with the consent of the fisheries commission board, who shall hold said offices at the pleasure of the fisheries commissioner and the board, whose duties shall be prescribed by the fisheries commissioner. The aforesaid commissioner and assistant commissioners shall receive such pay as the fisheries commission board shall determine. During the absence of the commissioner, or his inability to act, the fisheries commission board shall appoint one of the assistant commissioners to have and exercise all the powers of the commissioner. The commissioner and assistant commissioners shall each execute and file with the secretary of state a bond, payable to the state of North Carolina, in the sum of five thousand dollars for the commissioner and twenty-five hundred dollars each for each of the assistant commissioners, with sureties to be approved by the secretary of state, conditioned for the faithful performance of their duties and to account for and pay over, pursuant to law, all moneys received by them in their office. The fisheries commissioner and assistant commissioners shall take and subscribe an oath to support the constitution, and for the faithful performance of the duties of his office, which oaths shall be filed with their bonds. The assistant commissioners may be removed for cause by the commissioner, who may appoint their successors. (1915, c. 84, s. 1; 1917, c. 290, s. 1; 1925, c. 310.)

**Editor's Note.**—The word "three" in brackets was substituted by the Act of 1925, in lieu of "two".



## ART. 3. POWERS AND DUTIES OF BOARD AND OFFICERS

**§ 1878. Regulations as to fish, fishing, and fisheries made by board.**

The fisheries commission board is hereby authorized to regulate, prohibit, or restrict in time, place, character, or dimensions, the use of nets, appliances, apparatus, or means employed in taking or killing fish; to regulate the seasons at which the various species of fish may be taken in the several waters of the State, and to prescribe the minimum sizes of fish which may be taken in the said several waters of the State, or which may be bought, sold, or held in possession by any person, firm, or corporation in the State; and to make such rules regulating the shipment and transportation of fish, oysters, clams, crabs, escallops, and other water products as it may deem necessary; and all regulations, prohibitions, restrictions and prescriptions, after due publication, which shall be construed to be once a week for four consecutive weeks in some newspaper published in North Carolina, shall be of equal force and effect with the provisions of this act; and any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. (1915, c. 84, s. 21; 1917, c. 290, s. 7; 1925, c. 168, s. 2.)

**Editor's Note.**—The provision as to regulation of transportation of fish, etc., is new with the act of 1925.

At the end of section 2 of this act amending this section there appeared a clause headed "Subsec. (d)" and providing for a tax on clams. This clause was evidently intended as subsection (d) of section 3 of the act, amending section 1893, and has been included in that section.

**Jurisdiction.**—The jurisdiction of the board of fish commissioners over "the several waters of the State" is not confined to those specifically mentioned in this section, for they are only mentioned because the Legislature thought it desirable or necessary to make special provision for those places. *State v. Dudley*, 182 N. C. 822, 109 S. E. 63.

**The taking of escallops** from the "several waters of the State" expressly comes within the authority conferred by statute on the board of fish commissioners, and is also likewise included in the expression "mollusca," being "of the species pectinidae." *State v. Dudley*, 182 N. C. 822, 109 S. E. 63.

## ART. 4. TAXES AND REGULATIONS.

**§ 1891. Licenses for various appliances and their users; schedule.**

The following license tax is hereby levied annually upon the different fishing appliances used in the waters of North Carolina:

Anchor gill nets, one dollar for each hundred yards or fraction thereof.

Stake gill nets, twenty-five cents for each hundred yards or fraction thereof: "*Provided*, that when any person uses more than one such net the tax shall be imposed upon the total length of all nets used and not upon each net separately."

Drift gill nets, twenty-five cents for each hundred yards or fraction thereof.

Pound nets, two dollars on each pound; the pound is construed to apply to that part of net which holds and from which the fish are taken.

Submarine pounds, or submerged trap nets, two dollars for each trap or pound.

Seines, drag nets and mullet nets under one hundred yards, one dollar each.

Seines, drag nets and mullet nets over one hundred yards and under three hundred yards, one dollar per hundred yards or fraction thereof.

Seines, drag nets and mullet nets over three hundred yards and under one thousand yards, one dollar and twenty-five cents per one hundred yards or fraction thereof.

Seines, drag nets and mullet nets over one thousand yards, one dollar and seventy-five cents per one hundred yards or fraction thereof.

Fyke nets, fifty cents each.

Tonging for oysters, the license tax shall be one dollar and twenty-five cents for each tonger.

For taking scallops with rakes, tongs, scoops, or scrapes, one dollar for each person and for every person assisting or employed.

For taking clams with rakes, tongs, scoops or scrapes, one dollar for each person and for every person assisting or employed.

Nonresident motor boats chartered by residents of the State and used in taking shrimp, ten dollars (\$10.00) for each boat, and on each nonresident person acting as principal or employed in taking shrimp, a license tax of ten dollars (\$10.00) for each year.

Resident motor boats used in taking shrimp, three dollars (\$3.00) for each boat.

Motor boats used in hauling nets, five dollars (\$5.00) for each boat.

Motor boats used in dredging crabs or scallops, three dollars (\$3.00) for each boat.

For each trawl used in taking fish or shrimp, one dollar (\$1.00).

Nonresident angler's license to fish with rod and reel anywhere in the fresh waters of the State during the open season, five dollars (\$5.00) each; that nothing herein contained shall be construed so as to require an angler's license of any one to fish on his own land or on any privately owned lake or pond.

And for other apparatus used in fishing, the license shall be the same as that for the apparatus or appliance which it most resembles for the purpose used.

In addition to the officers now empowered by law, the clerks of the Superior Courts in the State are authorized to issue nonresident angler's license under chapter thirty-seven, Consolidated Statutes of North Carolina, in accordance with rules and regulations to be prescribed by the State Fisheries Commission Board. (1915, c. 84, s. 14; 1917, c. 290, s. 5; 1919, c. 333, s. 3; 1925, c. 168, s. 1.)



**§ 1893. Purchase tax on dealers; schedule; collection.**

All dealers in and all persons who purchase, catch, or take for canning, packing, shucking, or shipping the sea products enumerated below shall be liable to a tax to be collected by the fisheries commission board as follows: On —

[oysters, two and three-quarters cents a bushel, except coon oysters, one cent a bushel;]

escallops, five cents a gallon;

[clams, five cents a bushel;]

soft crabs, two and one-half cents a dozen,

hard crabs, ten cents a bushel;

[crab meat, ten cents a gallon;]

shrimps, cooked or green one-fourth cent a pound.

But none of these products shall be twice taxed, and no tax shall be imposed on oysters, escallops, or clams taken from private beds or gardens. Upon failure to pay said tax, the license provided in the preceding section shall at once be null and void and no further license shall be granted during the current year; and it shall be the duty of the commissioner, assistant commissioner, or inspector to institute suit for the collection of said tax. Such suit shall be in the name of the state of North Carolina on relation of the commissioner or inspector at whose instance such suit is instituted, and the recovery shall be for the benefit and for the use of the general fisheries commission fund. Any person failing or refusing to pay said tax shall be guilty of a misdemeanor. (1915, c. 84, s. 13; 1917, c. 290, s. 4; 1919, c. 333, s. 1; 1921, c. 194, s. 2; Ex. Sess. 1921, c. 42, ss. 2-4; 1923, c. 170; 1925, c. 168, s. 3.)

**Editor's Note.**—Although sec. 3 of the act of 1925, amending this section, did not mention clams, a clause headed "Subsec. (d) appeared in sec. 2, of the act which manifestly was intended as a part of sec. 3, which was the only section having lettered subsections.

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**CHAPTER 38****GAME LAWS****ART. 1. ADMINISTRATION OF GAME LAWS****§ 2085. County license for hunters.**

Any nonresident of the state of North Carolina who desires to hunt, shoot or trap birds or other animals in any part of the said counties shall make application to the clerk of the superior court of the county where the applicant desires to hunt, shoot or trap, who shall issue such a license upon payment of a tax of ten dollars and the clerk's fees, amounting to fifty cents. The license shall expire on the termination of the hunting season, as fixed for the said counties. The license shall be of such form as the game protection commission of the county shall prescribe, and shall entitle

the owner to hunt in any county enumerated in the first section of this chapter, in the manner provided by law for hunting in such county. Any license granted hereunder shall entitle the holder to hunt only in the county issuing the same.

Licenses under this section shall issue only in the counties enumerated in the first section of this chapter. [*Provided*, that in Randolph County any nonresident of the State of North Carolina who desires to hunt, shoot or trap birds or other animals in Randolph County shall pay a license fee of twenty-five dollars; and any resident of North Carolina, nonresident of Randolph County, shall pay a license fee of fifteen dollars: *Provided further*, it shall be unlawful for any person to kill in any one day more than fifteen quail or partridge in Randolph County.]

*Provided*, that nothing in the part of this section in brackets shall prevent a person or persons residing in or out of Randolph County from hunting game on his or their own land.

That any person violating the provisions of the part of this section in brackets shall be guilty of a misdemeanor and upon conviction fined not more than fifty dollars or imprisoned not exceeding thirty days.] (1909, c. 840, s. 3; 1925, c. 208.)

#### ART. 2. PROTECTION OF GAME AND BIRDS; GENERAL PROVISIONS

##### § 2105 (b). Molestation of game within sanctuary.

It shall be unlawful to trap, hunt, shoot, or otherwise kill, within the sanctuary established by the preceding section, any deer, squirrels, or other wild animals, except wild-cats, any wild turkeys, pheasants, eagles, hawks, ravens, or any kind of bird life. Any person violating the provisions of this section shall be guilty of a misdemeanor. (1923, c. 191, ss. 2, 3; 1925, c. 212.)

**Editor's Note.**—By the act of 1925 a proviso excepting Watauga County from the operation of the section was stricken out.

#### ART. 4. CLOSE SEASONS FOR GAME

##### § 2114. Squirrel.

The close season of each year during which no squirrel shall be hunted, killed, or in any way captured, shall be, as to the several counties specified, as follows: Martin—March 1 to September 1. (1909, c. 602; 1924, c. 89.)

**Editor's Note.**—Martin County was the only one affected by the act of 1924, consequently it is the only one repeated here.

##### § 2116. Quail or partridge.

The close season of each year during which no quail or partridges shall be shot, killed, wounded, or in any manner hunted, taken or captured, shall be, as to the several counties specified, as



follows: Martin—March 1 to November 15. (Rev., s. 1884; 1924, c. 90.)

**Editor's Note.**—Martin County was the only one affected by the act of 1924.

#### ART. 5. GENERAL HUNTING LAWS

##### § 2125. Hunting deer by firelight.

If any person shall hunt for deer with a gun in the woods in the night-time, by firelight, [electric light, flash-light, lantern, torch, or any other artificial light whatsoever] or shall kill or catch any wild deer while swimming streams or other bodies of water, the person so offending shall be guilty of a misdemeanor and shall [be fined or imprisoned in the discretion of the court]. When more persons than one are engaged in committing the offense of fire-hunting, any one may be compelled to give evidence against all others concerned; and the witness, upon giving such information, shall be acquitted and held discharged from all penalties and pains to which he was subject by his participation in the offense.

This section shall not apply to Currituck county. (Rev., s. 3462; Code, ss. 1058, 1059; R. C., c. 34, ss. 95, 96; 1774, c. 103; 1784, c. 212, ss. 1, 3; 1801, c. 595; 1856-7, c. 24; 1879, c. 92; 1905, c. 388; 1925, c. 194.)

#### ART. 6. LOCAL HUNTING LAWS

##### § 2141 (a). Protection of game in certain parks or reservations.

It shall be unlawful for any person or persons to hunt, trap, capture, willfully disturb, or kill any animal or bird of any kind whatever, or take the eggs of any bird within the limits of any park or reservation in that part of the state of North Carolina situated west of the main line of the Southern Railway running from Danville, Virginia, by Greensboro, Salisbury, Charlotte, and Atlanta, Georgia, for the protection, breeding, or keeping of any animals, game, or other birds, including buffalo, elk, deer, and such other animals or birds as may be kept in the aforesaid park or reservation, by any person or persons either in connection with the government of the United States, or any department thereof, or held or owned by any private person or corporation [without the permission or authority of the owner or manager of such association]. (Ex. Sess. 1921, c. 6, ss. 1, 4; 1925, c. 193, s. 1.)

##### § 2141 (b) Violation of law a misdemeanor.

Any person or persons who [without the permission or authority of the owner or manager of such park or reservation] shall hunt, trap, capture, willfully disturb, or kill any animal or bird, or take the eggs of any bird of any kind or description in any park or reservation as described in section 2141 (a), at any time

during the year, shall be guilty of a misdemeanor, and shall be fined or imprisoned in the discretion of the court for each and every offense. (Ex. Sess. 1921, c. 6, s. 2; 1925, c. 193, s. 2.)

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## CHAPTER 39

### GAMING CONTRACTS AND FUTURES

#### ART. 1. GAMING CONTRACTS

##### § 2142. Gaming and betting contracts void.

**Rights of Innocent Holder of Gambling Note.**—This section applicable to a note originally given for a gambling debt, renders this and all notes and contracts in like cases void, this being true, no action thereon can be sustained. The position as stated is undoubtedly the law in this jurisdiction, and is in accord with well considered authorities elsewhere. This principle, however, is allowed to prevail only where the action is on the note to enforce its obligations, and does not affect or extend to suits by an innocent endorsee for value, and holder in due course, against the endorser on his contract of endorsement. *Wachovia Bank, etc., Co. v. Crafton*, 181 N. C. 404, 405, 107 S. E. 316. See notes of this case under section 3047.

#### ART. 2. CONTRACTS FOR "FUTURES"

##### § 2144. Certain contracts as to "futures" void.

**Contracts to Which This Section Applies.**—Where the defendant has induced the plaintiff to purchase certain shares of stock, through himself, from his own broker, upon margin, the broker to carry the stock upon its hypothecation with him as collateral, and thereafter the defendant has his broker, unknown to the plaintiff, to sell the stock and place the proceeds to his own account, and uses the same and other moneys upon margin advanced from time to time by the plaintiff upon his representation that the price of this stock had decreased, it was held, that the plaintiff may recover of the defendant in his action the moneys the defendant had thus converted to his own use; and this section, relating to gambling, etc., is not available to the defendant as a defense. *Gladstone v. Swain*, 187 N. C. 712, 122 S. E. 755.

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## CHAPTER 40

### GUARDIAN AND WARD

#### ART. 3. GUARDIAN'S BOND

##### § 2162. Terms and conditions of bond; increased on sale of realty.

Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally



bound. The penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the infant, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or of any other person. [*Provided, however*, the clerk of the Superior Court may accept bond in estates, where the value of all personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars, in a sum equal to the value of all the personal property and rents and profits from real estate, plus ten per cent of the value of all the personal property and rents and profits from real estate belonging to the estate.] The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold. (Rev., ss. 323, 1778; Code, s. 1574; R. C., c. 54, s. 5; 1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; 1868-9, c. 201, s. 11; 1874-5, c. 214; 1925, c. 131.)

#### ART. 5. SALES OF WARD'S ESTATE

### § 2180. Special proceedings to sell; judges' approval required.

**Not Applicable to Settlement or Partition.**—This section does not apply either to the settlement of estates or to partition. *Clark v. Carolina Homes (N. C.)*, 128 S. E. 20, 26.

**When Foreign Guardian May Sell.**—Where a foreign guardian has complied with the provisions of C. S., 2195, 2196, which authorizes him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction, he may, in the same proceedings, and incident thereto, have the real property of his wards sold and converted into money in conformity with the provisions of this section, when the wards are represented therein by their next friend, and it is made to appear that their interests will be promoted thereby, etc. *Cilley v. Geitner*, 183 N. C. 528, 111 S. E. 866.

#### ART. 8. FOREIGN GUARDIANS

### § 2195. Right to removal of ward's personality from state.

**Necessity for Removal—Local Guardian Not Necessary.**—Where a foreign guardian has been duly appointed in the state of his own residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the financial ability of the sureties to protect the estate of his wards and in conformity with this section and section 2196, with his petition to the clerk of the court as required by these statutes, it is not necessary that a local guardian be appointed, but the court in this State, before which the matter is properly

pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the peace of foreign jurisdiction. *Cilley v. Geitner*, 183 N. C. 528, 111 S. E. 866.

Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required that the guardian appointed be a resident of this State, according to our law, unless the funds have been properly removed to another state, under this section and section 2196; and the law of this State governs the interpretation of the will when the testator died domiciled here. *Cilley v. Geitner*, 183 N. C. 714, 110 S. E. 61.

**Sale by Foreign Guardian.**—See notes to § 2180.

## § 2196. Contents of petition; parties defendant.

See notes to §§ 2180, 2195.

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## CHAPTER 41

### HABEAS CORPUS

#### ART. 2. APPLICATION

### § 2206. When application denied.

**Sentence Partly Valid and Partly Void.**—Where a prisoner is detained by virtue of a sentence in part valid, and part otherwise, he may not be liberated on habeas corpus until he shall have served the valid portion of his sentence, and he shall be remanded when it appears that the time during which he may legally be detained has not expired. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351. See notes of this case under sections 2235 and 2243.

**Process by United States Judge.**—The petitioner in habeas corpus proceedings adjudged in contempt of court shall, under the provisions of this section, be remanded when upon the hearing it is made to appear that he is held in custody by virtue of a process issued by a court or judge of the United States where such judge or court has exclusive jurisdiction. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

#### ART. 6. PROCEEDINGS AND JUDGMENT

### § 2234. Proceedings on return; facts examined; summary bearing of issues.

**Right of Appeal.**—See note to section 2242.

### § 2235. When party discharged.

**Questions Open to Inquiry.**—Where the petitioner in habeas corpus proceedings is held under a final sentence of a court, a commitment of contempt or other, the only questions open to inquiry at the hearing are whether on the record the court had jurisdiction of the matter and whether on the facts disclosed in the record and under the law applicable to the case in hand, the court has exceeded its powers in imposing the sentence whereof the petitioner complains. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351.

**Sentence Partly Valid and Partly Void.**—See notes to section 2206.



# ART. 7. HABEAS CORPUS FOR CUSTODY OF CHILDREN IN CERTAIN CASES.

## § 2241. Custody as between parents in certain cases; modification of order.

**Section Does Not Apply after Divorce.**—The superior court, in which a suit for divorce is pending, has exclusive jurisdiction as to the care or custody of the children of the marriage, before and after the decree of divorcement has been entered, C. S., 1664, and though by proceedings in habeas corpus under the provisions of this section, the custody of a child of the marriage may be awarded as between parents each of whom claim it, this applies only when the parents are living in a state of separation, without being divorced, or suing for a decree of divorcement; and where the decree of divorcement has been granted without awarding the custody of minor children of the marriage, the exclusive remedy is by motion of that cause. *In re Blake*, 184 N. C. 278, 114 S. E. 294.

When this section is considered in connection with section 1664, it becomes apparent that the Legislature intended that the custody of children shall be determined by the court in which the divorce was granted, and, where there is no divorce, by proceedings in habeas corpus. Jurisdiction of the court in which a divorce is granted to award the custody of a child is excluded and continuing. *In re Blake*, 184 N. C. 278, 281, 114 S. E. 294.

On appeal from the order of the Superior Court judge erroneously hearing proceedings in habeas corpus and awarding the custody of a child of the marriage, after a decree of divorcement had been entered, it was held, that the petitioner will pay the costs of this appeal, and the proper judge hearing the motion to be made in the said cause will determine its ultimate payment as between the parties. *In re Blake*, 184 N. C. 278, 114 S. E. 294.

Where a parent erroneously seeks the custody of a minor child of the marriage by proceedings in habeas corpus, after decree of divorce has been entered upon suit in the court of a certain county, without providing therefor, the Supreme Court, on appeal, having regard for the best interest of such child before the motion can be made in the court having granted the divorce, may exercise its powers given by Const. Art. IV, sec. 8, to generally supervise and control the proceedings of the inferior courts by remedial writ, or process and on this appeal from an order of the Superior Court judge, erroneously hearing the matter upon proceedings in habeas corpus, the Supreme Court adjudges that the custody of the child shall remain with the mother, as directed by the judge hearing the same, until the mother can properly seek her relief upon motion made in the action granting the divorce at the next term of the said court, or as soon thereafter as the judge may hear the same, upon giving the respondent ten days previous notice of her application. *In re Blake*, 184 N. C. 278, 114 S. E. 294.

**Priority of Claims—Effect of Juvenile Jurisdiction—Section 5039.**—*In re Blake*, 184 N. C. 278, 114 S. E. 294, it was suggested on the argument, and the court said with some show of reason, that if jurisdiction to pass upon the divorce decree is not exclusively in the court in which the divorce decree was granted, it would appear to reside in the juvenile court under the provisions of section 5039 et seq. This point, however was not decided in the case. And in *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824, it was held that the jurisdiction of the Superior Court or judge thereof in habeas corpus proceedings between husband and wife, living apart without divorce, where the custody of the minor children of their marriage is claimed by each of them, is not ousted or interfered with by the jurisdiction given by statute to the Juvenile Court.

While as a general rule and at common law the father has prima facie

the paramount right to the control and custody of his minor children until they arrive at age, the mother, in habeas corpus proceedings against her husband, may be allowed the superior claim when both are equally worthy and it is shown that the welfare of their children requires it. *Clegg v. Clegg*, 186 N. C. 28. In the opinion of this case, written by Judge Clarke, there is a comprehensive and able discussion and review of the authorities relating to the custody of children. Ed. Note.

### § 2242. Appeal to supreme court.

**Discretion in Supreme Court.**—When the Superior Court judge has entered judgment in habeas corpus proceedings between husband and wife, and has found the facts upon which his judgment was based, and both parties appeal, the Supreme Court, in its sound legal discretion, may review the judgment, and affirm, reverse or modify it. *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824.

Upon appeal to the Supreme Court from an order of the judge of the Superior Court in habeas corpus proceedings between husband and wife for the custody of the minor children of the marriage upon petition of the wife, living by mutual consent separated from her husband, without divorce, it is within the power of the Supreme Court, upon notification to the adverse party to appear before one of the Justices, and after a regular hearing, for the Justice to allow a supersedeas bond in a fixed amount, to stay the judgment of the lower court pending appeal, and by consent to set the hearing after the call of a certain district in the Supreme Court in term. *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824.

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## CHAPTER 42.

### INNS, HOTELS AND RESTAURANTS

#### ART. 2. SANITARY INSPECTION AND CONDUCT.

### § 2261. Life lines at bathing beaches.

For local act applying to Hanover County, see Acts 1925, ch. 111.

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## CHAPTER 43.

### INSANE PERSONS AND INCOMPETENTS

#### ART. 2. GUARDIANSHIP AND MANAGEMENT OF ESTATES OF INCOMPETENTS.

### § 2286. Guardian appointed on certificate from hospital for insane.

**Superintendents of Private Institutions.**—The certificates referred to in this section relate to the superintendents of hospitals under governmental control, and do not include within the meaning of the statute superintendents of private institutions, and the appointment by the clerk of guardians ad litem on their certificates is void. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568. See notes of this case under section 2287.



### § 2287. Restoration to sanity or sobriety; effect; how determined.

**Constitutionality.**—The constitutional provision preserving the right to a trial by jury, Article I, section 19, applies only to cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted, and this section, requiring that only six freeholders shall be summoned to inquire into the sanity of the person alleged to be insane, is constitutional, though not requiring a jury of twelve. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568.

**Ratification of Acts of Guardian Invalidly Appointed.**—Where the clerk of the court has unlawfully appointed a guardian ad litem, upon insufficient evidence, in proceedings to partition land, and thereafter the ward has been adjudged sane under the proceedings of this section, the ward may ratify the division of land allotted in the proceedings by receiving the benefits thereof, and executing interchangeable deeds with the other parties. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568. See note of this case under section 2286.

## ART. 4. SURPLUS INCOME AND ADVANCEMENTS

### § 2295 (a). Advancement to adult child or grandchild.

When such non-sane person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessities and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: *Provided*, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1925, c. 136, s. 1.)

### § 2296. Advancement of surplus income to next of kin.

When any non-sane person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessities and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. [Whenever any non-sane person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the Superior Court for the county in which such person resided prior to insanity to order

from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his insanity, he contributed in whole or in part.] (Rev., s. 1900; Code s. 1677; R. C., c. 57, s. 9; 1924, c. 93.)

### § 2300. Clerk may select those to advance.

When the surplus aforesaid [or advancement from the principal estate] is not sufficient to make distribution among all the parties, the clerk may select and decree advancements to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper. (Rev., s. 1904; Code, s. 1681; R. C., c. 57, s. 13; 1925, c. 136, s. 2.)

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## CHAPTER 44.

### INTEREST

### § 2305. Legal rate is six per cent.

See notes to section 2306.

### § 2306. Penalty for usury; corporate bonds may be sold below par.

**Purpose.**—Statutes prohibiting charging usury or an illegal rate of interest are enacted for the benefit of the borrower. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388.

**Usury Defined.**—Interest at a rate in excess of 6 per centum per annum, when knowingly taken, received, reserved, or charged, is usury. *Sloan v. Piedmont Fire Ins. Co. (N. C.)*, 128 S. E. 2, 3.

**Four Requisites.**—There are four requisites to an usurious transaction: a loan express or implied; an understanding between the parties that the money lent shall be returned; there shall be a greater rate of interest than allowed by law paid or agreed to be paid, and a corrupt intent to charge the usurious rate, such intent consisting in knowingly charging or receiving excessive interest with the knowledge that it is prohibited by law; and it appearing in this case that the plaintiff, though induced by defendant to make the loan under a pretext of friendship, knowingly accepted the latter's note with usurious interest included, the transaction comes within the definition of usury. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388.

**Tender and Payment of Correct Interest.**—Upon the principle that he who seeks equity must do equity, the plaintiff in his suit to enjoin the foreclosure of a mortgage upon the ground of usury, must tender the correct amount of the mortgage debt with the legal rate of interest thereon, the remedy to recover under the usury statute being an independent action at law. *Miller v. Dunn*, 188 N. C. 397, 124 S. E. 746.

Where the plaintiff seeks by injunction relief from the foreclosure of a mortgage on his lands on the ground of usury, his remedy being by an action at law under this section, he must, under the rules of equity, offer to repay the principal sum due and the legal rate of interest thereon, under the equitable principle that he who asks equity must do equity, and he may not resist the foreclosure of the mortgage on the sole ground that



he has been charged a usurious rate of interest, contrary to the provisions of the statute on the subject. *Waters v. Garriss*, 188 N. C. 305, 124 S. E. 334.

Where the senior mortgage is affected with a charge of usury, the amount to be paid by the junior mortgagee, before requiring the assignment, is the principal sum due, without interest. *Broadhurst v. Brooks*, 184 N. C. 123, 113 S. E. 576.

**Waiver.**—The borrower may waive his rights under this section. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388.

**Same—Consent Judgment.**—By consent judgment entered in an action upon a note, wherein usury was set up by the defendant, and the parties have agreed upon a compromise in a certain sum, signed and entered by the court, the defendant waives his right under our usury law, and may not thereafter maintain the defense that a note he had given the plaintiff, in the amount of the judgment, was tainted with the usury of the first transaction. *Ector v. Osborne*, 179 N. C. 667, 103 S. E. 388.

**Question for the Jury.**—Where the plea of usury under this section is made by the plaintiff in the action to enjoin defendant from the sale of land securing a mortgage note, and there is a dispute as to whether the charge made was usurious, and as to the amount due under the mortgage, it is reversible error for the trial judge to assume the correctness of plaintiff's contentions as a fact, and take the case from the jury accordingly. *Miller v. Dunn*, 188 N. C. 397, 124 S. E. 746.

**Limitation of Actions on Usurious Contracts.**—See notes to section 442.

## § 2308. Obligations due guardians to bear compound interest.

**Assignment of Bonds.**—In *Cobb v. Fountain*, 187 N. C. 335, 337, in discussing the right of a guardian to discharge himself at the termination of his trust, Judge Adams said: "in equity the guardian is entitled to transfer the bonds to the ward in satisfaction and is not bound to pay the ward in money. Indeed the statute expressly provides that the guardian may assign any uncollected bonds to the ward and that such assignment shall be a discharge pro tanto."

## § 2309. Contracts except penal bonds, and judgments to bear interest; jury to distinguish principal.

**Time from Which Interest Allowed—On Contracts.**—In *Bell v. Danzer*, 187 N. C. 224, 232, 122 S. E. 448, the court said: "The allowance of interest from 1 August, 1922, was based on the finding that the plaintiff did not comply with his contract until that time. Unless the general rule is modified by this finding, interest should be allowed from the date of the contract."

**Same—On Official Bonds.**—The surety bond of a clerk of the Superior Court is fixed as to amount in the sum of five thousand dollars, and to that extent a surety is responsible for the refalcation of his principal, including 6 per cent interest from the time of notice given it, except from judgment thereon, when a different principal applies and the surety is liable for 6 per cent interest on the judgment until it is paid. *State v. Martin*, 188 N. C. 119, 123 S. E. 631.

In North Carolina, both by statute and judicial decision, the surety's liability may not exceed the penalty of the bond until judgment without regard to the limit of liability named in the bond, because the nature of the demand is altered by the judgment, and under the statute such judgment would bear interest at the rate of 6 per cent per annum until paid. *State v. Martin*, 188 N. C. 119, 123, 123 S. E. 631.

**Interest Included in Verdict.**—Where it has been ascertained by the verdict of the jury, upon a trial free from error, that the plaintiff is entitled to recover of the defendant the value of permanent improvements

he has put upon the defendant's land under a parol agreement that the latter would convey a part of the lands in consideration thereof, void under the statute of frauds, to the extent that the improvements have enhanced the value of the land, interest is properly allowed in the judgment from the time of the defendant's breach, on the amount ascertained to be due at that time; and objection that the jury may have included the interest in their verdict is untenable when it appears that nothing was said by counsel or court in respect to it, the presumption being to the contrary. *Perry v. Norton*, 182 N. C. 585, 109 S. E. 641.

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## CHAPTER 45.

### JURORS

#### ART. 1. JURY LIST AND DRAWING OF ORIGINAL PANEL.

#### § 2312. Jury list from taxpayers of good character.

**Provisions Directory.**—The board of county commissioners, in drawing the names for the grand jury, placed the scrolls with the names of the qualified jurors separately in envelopes, as to each precinct, with the name of the precinct marked on each envelope, and proceeded to draw the jurors apportioned to each precinct from the scrolls of names of the jurors therefrom, placed in box No. 1, and drawn by a child under ten years of age, with the purpose and effect of thus drawing from each and every of the precincts of the county its proportionate number of qualified jurors. In other respects the directions of this and the two following sections were complied with, and this having been done in good faith, and without the opportunity for fraud, it was held, that these statutes being directory upon the matter excepted to, except as to the qualification required of jurors, the irregularity complained of did not invalidate the indictment of the defendant in this case, and his motion to quash it for irregularity was properly denied. The importance of conforming to the directory provisions of these statutes emphasized by *Walker, J. State v. Mallard*, 184 N. C. 667, 114 S. E. 17.

#### § 2313. Names on list put in box.

See notes to section 2312.

#### § 2314. Manner of drawing panel for term from box.

See notes to section 2312.

#### § 2316. Jurors having suits pending.

**Not Applicable to Criminal Actions.**—Where a juror has a civil action calendared for the term and continued in the discretion of the trial judge, it is not objectionable that he be permitted by the court to sit as a juror in a criminal action at the same term, the reason of this section for the disqualification being removed. *State v. Ashburn*, 187 N. C. 717, 122 S. E. 833.

#### ART. 2. PETIT JURORS; ATTENDANCE, REGULATIONS AND PRIVILEGES.

#### § 2325. Questioning jurors without challenge.

**Not Affected by Section 4634.**—The effect of this section was to permit a party to a criminal action to make inquiry as to the fitness and com-



petency of a juror before the adverse party would be permitted to admit the cause and have him stood aside therefor, and this course cannot now be pursued, except where the challenging party, after making such inquiry, states that the juror is challenged for cause; and C. S., 4634, abolishing the established practice permitting the solicitor to place jurors, upon the trial of a capital felony, at the foot of the panel, does not affect the application of this section, to the trial of such felonies. *State v. Ashburn*, 187 N. C. 717, 122 S. E. 833.

### § 2326. Causes of challenge to jurors drawn from box.

**Service within Last Two Years.**—Where a juror has been drawn from the jury box by the statutory method, to serve on special venire for the trial of the prisoner for murder, and summoned accordingly by the sheriff, an exception to a juror retained by the court that he has served on the jury within the last two years, and that prisoner's challenge of him has been disallowed, is untenable, the provision relating to talesmen not applying in such instances. *State v. Williams*, 185 N. C. 643, 644, 116 S. E. 570.

## ART. 4. GRAND JURORS.

### § 2333. How grand jury drawn.

**Twelve Jurors Sufficient.** — Eighteen jurors are not necessary to the finding of an indictment, but twelve are sufficient in North Carolina as at common law *State v. Stewart*, 189 N. C. 340, 127 S. E. 260.

### § 2334. Grand juries in certain counties.

At the first fall and spring terms of the criminal courts held for the counties of Gaston, Guilford, Mecklenburg, Moore, Richmond, New Hanover, McDowell, Durham, Cumberland, Columbus, Nash, and Wake, grand juries shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve during the remaining fall and spring terms, respectively.

At any time the judge of the superior court presiding over either the criminal or civil court of New Hanover, McDowell, Durham, and Cumberland counties may call said grand jury to assemble and may deliver unto said grand jury an additional charge. The said judge presiding over either the criminal or civil court of New Hanover, McDowell, Durham, or Cumberland counties may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn which shall serve during the remainder of the said fall or spring term. The first nine members of the grand jury chosen at the first term of the superior court of Cumberland county for the trial of criminal causes in the year of one thousand nine hundred twenty-two shall serve during the spring and fall terms, and at the first of such courts of the fall and spring terms thereafter, nine additional jurors shall be chosen to serve for one year.

At any time the judge of the superior court presiding over the criminal court of Columbus county may call said grand jury to assemble and may deliver unto said jury an additional charge. The said judge presiding over the criminal court of Columbus county may at any time discharge said grand jury from further service,

and may cause a new grand jury to be drawn, which shall serve during the remainder of the said fall and spring term.

Every grand juror drawn and summoned in Robeson county shall serve for a period of twelve months.

At the spring term of the criminal court held for the county of Gates, grand jury shall be drawn, the presiding judge shall charge them as provided by law, and they shall serve for twelve (12) months: *Provided*, that at any time the judge of the superior court presiding over the criminal courts of Gates county may call said jury to assemble and may deliver unto said grand jury an additional charge: *Provided further*, that the judge of the superior court presiding over the criminal courts of Gates county may at any time discharge said grand jury from further service, and may cause a new grand jury to be drawn, which shall serve during the remainder of the said twelve (12) months.

At the April term of superior court held for the county of Hoke a grand jury shall be drawn, the presiding judge shall charge it as provided by law, and it shall serve until the following April term, Hoke superior court: *Provided*, that at any time the judge of the superior court presiding over either criminal or civil court in said county may call said grand jury to assemble and may deliver unto said grand jury an additional charge: *Provided further*, that the judge of the superior court presiding over either criminal or civil court in said county may at any time discharge said grand jury from further service, in which event he shall cause a new grand jury to be drawn, which shall serve out the unfinished year.

If it should appear to the board of commissioners of Union county, thirty days before the beginning of the term of superior court that begins on the third Monday after the first Monday in March, that the condition of the criminal docket, and the number of prisoners in jail, make it necessary that said March term should be used as a criminal term, the said board of commissioners are authorized and empowered within their discretion to draw a grand jury for said term, and to give thirty days notice in some local paper that criminal cases would be tried at said term, and all criminal process and undertakings returnable to a subsequent term shall be returnable to said March term. (1913, c. 196; 1917, cc. 116, 118; 1919, cc. 113, 187; Ex. Sess. 1920, c. 39; 1921, cc. 18, 55, 69, 72; Ex. Sess. 1921, c. 15; 1923, cc. 11, 15, 104, 115; 1925, c. 24.)

**Editor's Note.**—By the act of 1925, the local provisions for Camden county, formerly appearing in the fifth paragraph of the section with Gates, were stricken out.

#### ART. 5. SPECIAL VENIRE.

### § 2338. Special venire to sheriff in capital cases.

**Discretion of Judges.** — The ordering of a special venire where the prisoner is charged with a capital offense, and the manner in which it shall be summoned or drawn, when so ordered, whether selected by the sheriff under this section, or drawn from the box under C. S., 2339, are both



discretionary with the judge of the Superior Court, and unless an objection goes to the whole panel of jurors, it may not be taken advantage of by a challenge to the array, unless there is partiality or misconduct of the sheriff shown, or some irregularity in making out the list. *State v. Levy*, 187 N. C. 581, 122 S. E. 386.

### § 2339. Drawn from jury box in court by judge's order.

See notes to section 2338.

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## CHAPTER 46.

### LANDLORD AND TENANT

#### ART. 1. GENERAL PROVISIONS.

### § 2349. Agreement to rebuild, how construed in case of fire.

As to repair when no agreement exists, see notes to section 2352.

**In General.**—In 24 Cyc., 1089 it is said: "According to the common-law rule, which has been followed generally in this country, a covenant on the part of the lessee to repair or keep in good repair imposes on him an obligation to rebuild the demised premises if they are destroyed during the term by fire or other casualty, even where he is without fault," citing a large number of cases. It is pointed out, however, that in some States this rule has been modified by statute. In this State the only modification has been that specified in this section, namely in the case of a house destroyed by fire or damaged to more than one-half. *Chambers v. North River Line*, 179 N. C. 199, 202, 102 S. E. 198.

"The word 'maintain' is practically the same thing as repair, which means to restore to a sound or good state, after decay, injury, dilapidation, or partial destruction." *Chambers v. North River Line*, 179 N. C. 199, 102 S. E. 198.

The lessee's covenant to maintain the leased premises in its present condition is equivalent to a general covenant to repair and leave in repair under the common law, and unless otherwise stated in the lease or provided by statute this duty is not affected by the lessee's negligence or the fact that the property had been destroyed during the continuance of the lease by the act of God or the public enemy. *Chambers v. North River Line*, 179 N. C. 199, 102 S. E. 198.

**Section Confined to Houses Destroyed by Fire.**—This statute was enacted to change the rule formerly existing, but limits its application to the destruction of a house by accidental fire, and then when it is damaged to more than half its value. *Chambers v. North River Line*, 179 N. C. 199, 202, 102 S. E. 198.

Where a wharf and pier are the subjects of a lease wherein the lessor has covenanted to maintain, etc., and its partial destruction was caused by the breaking up of the ice on the water, the lessor's obligation is not affected by this section. *Chambers v. North River Line*, 179 N. C. 199, 203, 102 S. E. 198.

### § 2350. Tenant not liable for accidental damage.

See notes to § 2349.

### § 2352. Lessee may surrender, where building destroyed or damaged.

**Prerequisites to Application.**—An inspection of this section will show that not only is it in terms confined to a demised house or other building, but that it expressly excepts from its provisions those in which there is an "agreement respecting repairs." An inspection of the statute will further disclose that by its express terms it requires, as a condition precedent to its application, that a lessee "surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damages." *Chambers v. North River Line*, 179 N. C. 199, 203, 102 S. E. 198. See notes of this case under section 2349.

**Lessee Cannot Claim Rights under Provision of Lease.**—The modification of the common law liability of the lessee of a building, etc., to pay the rent, when the building was accidentally destroyed, etc., during the term of his lease, by this section, under certain conditions, is to some extent a legislative recognition that, without its provisions, the principles of the common law would prevail; and neither the statute, being for the benefit of the lessee, nor the common law principle, has application, when the lessee is insisting on certain rights arising to him under the provisions of the lease. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884.

**Time Allowed for Repairs.**—Where a monthly rental to be paid by the lessee or a building, and an obligation to make certain repairs by him, is specified as the consideration for the lease, with forfeiture of the lease upon the non-payment of the rent at stated times, the lessee's liability to repair and to pay rent are, as a rule, distinct and independent obligations, and the law will imply that the lessee be given a reasonable time in which to make the repairs if none is stated in the lease. *Miles v. Walker*, 179 N. C. 497, 102 S. E. 884.

**Surrender of Estate by Lessee.**—The common law doctrine that the lease of a store or other building conveying the present right to the soil, does not relieve the lessee of his obligation to pay the stipulated rent during the term unless the contract so provides or the lessor is under contract to repair, when the building is destroyed by accidental fire, or so injured as to be unfit for its purpose, has been modified to some extent by this section, providing in such instances, and where the main inducement for the contract was the use of the house, that the lessee may surrender the estate by a writing to that effect delivered within ten days from the damage and on paying the rent accrued and apportioned as to the remainder of the injury. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884.

**When Landlord Restores Building.**—Though the landlord may be under no implied obligation to restore or repair a building which had been destroyed, etc., if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for breach the landlord may be held responsible. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884.

The leased premises, consisting of a building for a store was accidentally destroyed by fire during the leased period, without fault on the part of the lessee, the consideration being a stipulated monthly rental and the lessee's placing within the building certain shelving to become the property of the lessor at the termination of the lease, for one year or an extension of three years upon a certain further consideration. Soon after the commencement of the lease with the lessee in possession, and while preparing to put in the shelving, the fire occurred, and the landlord entered into possession, and erected a more attractive store building for which he could get a higher rent than for the destroyed store, and refused to let the lessee into possession, but rented it to another, for which the latter brings his action for damages. Held, suf-



ficient to sustain a verdict in plaintiff's favor. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884.

### § 2354. Notice to quit in certain tenancies.

A tenancy from year to year may be terminated by notice to quit giving one month or more before the end of the current year of tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. [And any tenant or lessee terminating any such tenancy shall notify the landlord the day the premises are vacated and deliver to such landlord or his agent the keys to the buildings thereon, and any tenant or lessee violating this provision shall be guilty of a misdemeanor and fined not more than fifty dollars (\$50) or imprisoned not more than thirty days. Provided that the portion of this section in brackets shall apply only to Pitt, Randolph and Montgomery counties.] (Rev., 1894; Code, s. 1750; 1891, c. 227; 1868-9, c. 156, s. 9; 1925, c. 196.)

## ART. 2. AGRICULTURAL TENANCIES

### § 2355. Landlord's lien on crops for rents, advancements, etc.; enforcement.

**Tenant Has Insurable Interest.**—It is true that under this section, the possession and title to all crops, raised by a tenant or cropper, in the absence of a contrary agreement, are deemed to be vested in the landlord until the rent and advancements have been paid. *S. v. Austin*, 123 N. C. 749; *Boone v. Darden*, 109 N. C. 74; *Smith v. Tindall*, 107 N. C. 88. But this perforce does not divest the tenant of an insurable interest in the crops before division. "It is well settled that any person has an insurable interest in property by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself." *Harrison v. Fostlage*, 161 U. S. 57; *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass., 423. *Batts v. Sullivan*, 182 N. C. 129, 131, 108 S. E. 511.

**Liability of Landlord for Marketing of Tenant's Tobacco.**—The landlord and tenant act (this section) gives the landlord only a preferred lien on his tenant's crop on his rented lands for the payment of the rent; and unless and until the landlord has acquired a part of his tenant's crop for the rent, he has acquired no tobacco from his tenant that comes within the provisions of his membership contract in the Tobacco Growers Co-operative Association, and is not liable for the penalty therein contained for failure to market the tobacco raised by his tenant. *Tobacco Growers Co-Op. Ass'n v. Bissett*, 187 N. C. 180, 121 S. E. 446.

## ART. 3. SUMMARY EJECTMENT.

### § 2365. Tenant holding over may be dispossessed in certain cases.

**Landlord Proper Party to Bring Action.**—The landlord under whom a tenant has entered into the possession of the leased premises is the proper one to bring his summary action of ejectment (authorized by this section) to dispossess the tenant holding over after the expiration of his lease, upon proper notice to vacate, and the objection of the tenant that the landlord has again leased the premises to another to begin immediately upon the expiration of his term, and that the second lessee is the only

one who can maintain the proceedings in ejectment, is untenable. *Shelton v. Clinard*, 187 N. C. 664, 122 S. E. 477.

### § 2373. Undertaking on appeal; when to be increased.

See notes to § 988.

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## CHAPTER 47

### LAND REGISTRATION

#### ART. 1. NATURE OF PROCEEDING.

### § 2377. Jurisdiction in superior court.

**When Proceedings Consolidated.** — A proceeding for the purpose of rejecting title and an injunction to prevent trespass, involving the same land and the same parties may be consolidated. *Blount v. Sawyer* (N. C.), 126 S. E. 512.

#### ART. 3. PROCEDURE FOR REGISTRATION

### § 2386. Notice of petition published.

In addition to the summons issued, prescribed in the foregoing section, the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together with a short but accurate description of the land and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper. The notice shall set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern," and shall give notice to all persons of the relief demanded and the return day of the summons: Provided, that no final order or judgment shall be entered in the cause until there is proof and adjudication of publication as in other cases of publication of notice of summons. The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof. [The clerk of the court shall also record a copy of said notice in the *lis pendens* docket of his office and cross-index same as other notices of *lis pendens* and shall also certify a copy thereof to the Superior Court of each county in which any part of said land lies, and the clerk thereof shall record and cross-index same in the *lis pendens* records of his office as other



notices of lis pendens are recorded and cross-indexed.] (1913, c. 90, s. 7; 1915, c. 128, s. 1; 1919, c. 82, s. 2; 1925, c. 287.)

### **§ 2388. Effect of decree; approval of judge.**

Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, "to whom it may concern;" and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this state of his or its right or title thereto. It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. [Such decrees shall not be binding on and include the State of North Carolina or the State Board of Education unless notice of said proceeding and copy of petition, etc., as provided in this chapter, are served on the Governor and on the State Board of Education severally and personally.] Such decree shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries. (1913, c. 90, s. 9; 1919, c. 82, s. 3; 1925, c. 263.)

## **ART. 4. REGISTRATION AND EFFECT**

### **§ 2399 (a). Release from registration.**

Whenever the record owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of chapter forty-seven of the Consolidated Statutes, desires to have such estate released from the provisions of said chapter in so far as said chapter relates to the form of conveyance, so that such estate may ever thereafter be conveyed, either absolutely or upon condition or trust, by the use of any desired form of conveyance other than the certificate of title prescribed by said chapter, such owner may present his owner's certificate of title to such registered estate to the register of deeds of the county wherein such land lies, with a memorandum or statement written by him on the margin thereof in the words following, or words of similar import, to wit: "I (or we), ..... , being the owner (or owners) of the registered estate evidenced by this certificate of title, do hereby release said estate from the provisions of chapter

forty-seven of the Consolidated Statutes of North Carolina in so far as said chapter relates to the form of conveyance, so that hereafter the said estate may, and shall be forever until again hereafter registered in accordance with the provisions of said chapter and acts amendatory thereof, conveyed, either absolutely or upon condition or trust, by any form of conveyance other than the certificate of title prescribed by said chapter, and in the same manner as if said estate had never been registered." Which said memorandum or statement shall further state that it is made pursuant to the provisions of this act, and shall be signed by such record owner and attested by the register of deeds under his hand and official seal, and a like memorandum or statement so entered, signed and attested upon the margin of the record of the said owner's certificate of title in the registration of titles book in said register's office, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the registration of titles book showing that such entry has been made upon the owner's certificate of title; and thereafter any conveyance of such registered estate, or any part thereof, by such owner, his heirs or assigns, by means of any desired form of conveyance other than such certificate of title shall be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance in the same manner and to the same extent as if such estate had never been so registered. (1924, c. 40.)

#### ART. 6. METHODS OF TRANSFER

##### **§ 2417 (a). Validating conveyance by entry on margin of certificate.**

In all cases where the owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of chapter forty-seven of the Consolidated Statutes, has heretofore and subsequent to such registration made any conveyance of such estate, or any portion thereof, by any form of conveyance sufficient in law to pass the title thereto if the title to said lands had not been so registered, the record owner and holder of the certificate of title covering such registered estate may enter upon the margin of his certificate of title in the registration of titles book a memorandum showing that such registered estate, or a portion thereof, has been so conveyed, and further showing the name of the grantee or grantees and the number of the book and the page thereof where such conveyance is recorded in the office of the register of deeds, and make a like entry upon the owner's certificate of title held by him, both of such entries to be signed by him and witnessed by the register of deeds, and attested by the seal of office of the register of deeds upon said owner's certificate, with the further notation made and signed by registration of titles book showing that such entry has been made upon the owner's certificate of title, and thereupon such conveyance shall become and be as valid



and effectual to pass such estate of the owner according to the tenor and purport of such conveyance as if the title to said lands had never been so registered, whether such conveyance be in form absolute or upon condition of trust; and in all cases where such conveyance has heretofore been made, upon the making of the entries herein authorized by the record owner and holder of such owner's certificate of title, the grantee and his heirs and assigns shall thereafter have the same right to convey the said estate or any part of the same in all respects as if the title to said lands had never been so registered: *Provided, however*, that the provisions of this section shall not affect any pending action or special proceeding. (1924, c. 41.)

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## CHAPTER 48

### LIBEL AND SLANDER

#### § 2429. Libel against newspaper; notice before action.

**Notice to Individuals.**—As to whether this section and the following sections of this chapter, as to notice to defendant in an action for libel, looking to retraction and apology, applies to individuals having no connection with a newspaper publishing the libel, *Query?* *Paul v. National Auction Co.*, 181 N. C. 1, 105 S. E. 881.

**Compensatory Damages.** — This section and the following sections in this chapter having significance only on the question of punitive damages, do not include compensatory damages for "pecuniary loss, physical pain, mental suffering, and injury to reputation." *Paul v. National Auction Co.*, 181 N. C. 1, 105 S. E. 881.

#### § 2432. Charging innocent women with incontinency.

**Construed to Protect Women.**—There is a manifest reason why the words "innocent and unprotected woman" in this section, should be construed to mean innocent of illicit sexual intercourse, as affecting her reputation when the slanderous words are spoken, for the purpose of this section is to protect women, who, however imprudent they may have been in other respects, have not so far 'stooped to folly' as to surrender their chastity and become incontinent, or who have regained their characters for innocence and chastity if a 'slip has been made' from 'the wanton and malicious slander' of persons who may attempt to destroy their reputations and blast and ruin their good names. *State v. Johnson*, 182 N. C. 883, 886, 109 S. E. 786.

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## CHAPTER 49

### LIENS

#### ART. 1. MECHANICS', LABORS' AND MATERIALMEN'S LIENS

For a comprehensive review of the sections incorporated in this article, see *Porter v. Case*, 187 N. C. 629, 122 S. E. 483.

#### § 2433. On buildings and property, real and personal.

See notes to section 2435.

**Contract Question for Jury.**—The right of the contractor's lien depends

upon the existence of a contract, express or implied; and where, in the contractor's action to enforce his lien, there is sufficient evidence thereof, an issue for the determination of the jury is raised, and the granting of the motion as of involuntary nonsuit against him is reversible error. *Porter v. Case*, 187 N. C. 629, 122 S. E. 483.

### § 2434. Buildings on married woman's land.

**In General.**—The liens given to those furnishing material to the contractor and used in the construction of houses against the owner, are now applicable to married women. *Rose v. Davis*, 188 N. C. 355, 124 S. E. 576.

### § 2435. On personal property repaired.

**In General.**—This section, is within the police power of the State and in addition to the common-law lien given artisans on personal property repaired by them, while in their possession, for the reasonable value of the repairs, provides for its enforcement by foreclosure in accordance with its stated terms. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603.

**To Whom Section Applies.**—The requirement of this section, that the lien in favor of the artisan making repairs on personal property shall attach under the provisions of the statute, only where made at the instance of the owner "or the legal possessor of the property," includes within its terms all persons whose authorized possession is of such character as to make reasonable repairs necessary to the proper use of the property, and which were evidently in the contemplation of the parties. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603.

**Priority over Vendor's Mortgage or Lien.** — This section, giving to artisans a lien for the reasonable value of their work done on personal property while retained in their possession, with a prescribed method of foreclosure for the enforcement of the lien, enters into every contract of sale of personal property, whether by chattel mortgage to secure the balance of the purchase price or other, made between the vendor and purchaser, and when enforceable, is superior to the vendor's lien or that created by the mortgage. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603.

Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee for an indefinite period, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at his instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603.

## ART. 2. SUBCONTRACTORS', ETC., LIENS AND RIGHTS AGAINST OWNERS

### § 2438. Notice to owner; liability.

**Section Mandatory.**—The liens given the furnisher of material on the building of the owner to the contractor, etc., are strictly statutory; and no lien can be acquired therefor unless notice has been given, as this section requires, while the owner still owes the contractor a balance upon the contract to be prorated among those who have a like claim; nor is it contemplated or provided by the statute that this will be altered by reason of the owner paying the contractor by agreement in advance of his work. *Rose v. Davis*, 188 N. C. 355, 124 S. E. 576.

**Notice to Clerk or Justice.**—This section does not require notice, by a subcontractor, to be filed before a justice of the peace or clerk as is required of contractor, but notice to the owner creates the lien. *Porter v. Case*, 187 N. C. 629, 122 S. E. 483.



### § 2439. Statement of contractor's indebtedness to be furnished to owner; effect.

**Effect of Mortgages Subsequent to Notice.**—Where the owner has been given the statutory notice of the subcontractor's claim upon the building, or the contractor filed his lien in accordance with the statute before the justice of the peace or clerk, as the case may be, the right to the money still due by the owner to the contractor relates back to the time of the furnishing of the material and the work under his contract; and where he has established this right by his action, those who have acquired liens by mortgage, etc., subsequent to the time of the notice take cum onore, and subject to the contractor's or subcontractor's lien so acquired. *Porter v. Case*, 187 N. C. 629, 122 S. E. 483.

**When Subcontractors Have Lien.**—Where the subcontractor and material furnisher for the erection of a building have given the owner an itemized statement of material furnished by them therefor, and at that time the owner owes the contractor moneys under the contract made with him, to that extent the subcontractors and materialmen have a lien for the payment of their claims so filed, and may maintain a civil action thereon against the owner under the provisions of this section and §§ 2440, 2441, without being required to file their liens within six months, etc., under the provisions of C. S., 2469, or bring suit within six months thereafter, under those of C. S., 2474. *Campbell v. Hall*, 187 N. C. 464, 121 S. E. 761.

### § 2445. Contractor on municipal building to give bond; action on bond.

**Liability of Surety.**—A contract for the erection of a public-school building, made with the county board of education, does not expressly or impliedly provide for the payment of claims of material furnishers by the obligation of the contractor to furnish the materials therefor at his own expense, without more; and a surety on the bond for the contractor's faithful performance of his contract is not liable to the material furnishers, either under the contract or under the provisions of this section, requiring the school authorities to take a bond with surety from the contractor before commencing the building, and giving materialmen, etc., a right of action thereon. *Warner v. Halyburton*, 187 N. C. 414, 121 S. E. 756.

**Liability of Board.**—This section, before its amendments by chapter 100, Public Laws 1923, requiring, among other things, a county board of education to take a bond with surety for the performance, etc., by the contractor under his contract to erect a public-school building, imposes a new duty on them in this respect, and provides for its enforcement by indictment of the individual members of the board, and no civil liability to the material furnishers, etc., attaches to the board, as such, for a failure to require a sufficient bond for the purpose. *Warner v. Halyburton*, 187 N. C. 414, 121 S. E. 756.

## ART. 8. PERFECTING, ENFORCING AND DISCHARGING LIENS

### § 2469. Claim of lien to be filed; place of filing.

**When Filing Unnecessary.**—Where the subcontractor and material furnished for the erection of a building have given the owner an itemized statement of material furnished by them therefor, and at that time the owner owes the contractor moneys under the contract made with him, to that extent the subcontractors and materialmen have a lien for the payment of their claims so filed, and may maintain a civil action thereon against the owner under the provisions of C. S., 2439, 2440, 2441, without being required to file their liens within six months, etc., under the provisions of this section, or bring suit within six months thereafter, under those of C. S., 2474. *Campbell v. Hall*, 187 N. C. 464, 121 S. E. 761.

**§ 2470. Time of filing notice.**

**In General.**—Where the owner has contracted for the erection of a building on his premises, in order for him to acquire a statutory lien thereon, it is required that the contractor file his lien before a justice of the peace or the clerk of the court, according to jurisdiction, within six months from the time moneys are due him, under the terms of his contract, by the owner, under this section, and bring his action to enforce the same within six months thereafter. *Porter v. Case*, 187 N. C. 629, 122 S. E. 483.

**§ 2474. Action to enforce lien.**

See note of *Porter v. Case*, 187 N. C. 629, 122 S. E. 483, under § 2470; and see note of *Campbell v. Hall*, 187 N. C. 464, 121 S. E. 761, under § 2439.

## ART. 9. AGRICULTURAL LIENS FOR ADVANCES

**§ 2480. Lien on crops for advances.**

If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, the person making the advances is entitled to a lien on the crops made within one year from that date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except the laborer's and landlord's liens, to the extent of such advances. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county where the person advanced resides: *Provided*, that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year, but that the said lien shall be effective only as to those crops planted within the calendar year of the execution of the said lien, and referred to in the said lien. (Rev., 2052; Code, 1799; 1893, c. 9; 1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; 1925, c. 302, s. 1.)

See note of *Tobacco Growers' Ass'n v. Patterson*, under § 5259.

**Editor's Note.**—Several changes were made by the act of 1925. Formerly the section gave a lien on crops made "during" the year; the section is made more definite by specifying crops made within a year from the date of the required agreement in writing. The limit of time within which the agreement should be registered (formerly 30 days), was omitted. The proviso at the end of the section is new.

**Priority of Liens.**—An agricultural lien, given by this section, for the purpose of enabling the cultivation of the soil to raise a crop, is preferred by the statute to all others, the only exception being that in favor of the landlord or laborer contained in section 2488, when it is in proper form and duly registered; and it is preferred to liens of other kinds existing by mortgage or deed in trust on the same crop, to the extent of the amount advanced thereunder. *Williams v. Davis*, 183 N. C. 90, 110 S. E. 577.

**Same—Not Subordinate to Marketing Agreement.**—In view of the policy of the state as manifested in the statutes to favor agricultural liens, such a lien for advances will not be held subordinate to a marketing agree-



ment. *Tobacco Growers' Co-Op. Ass'n v. Harvey & Son Co.*, 189 N. C. 494, 127 S. E. 545.

**Same—Landlord's Lien.**—The principle upon which the mortgagee by parol agreement may become the landlord and the mortgagor his tenant of the mortgaged land after the mortgagor's default, cannot give the landlord before default a lien for supplies, etc., superior to the lien of a chattel mortgage upon the crops raised, when the mortgagee has received and registered his mortgage while the mortgagor was in possession of the premises and before the default occurred or the parol agreement had been made. *Warrington v. Hardison*, 185 N. C. 76, 116 S. E. 166.

### § 2488. Crop seized and sold to preserve lien.

See notes to section 2480.

### § 2490. Local: Short form of liens.

For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced, and also to constitute a valid chattel mortgage as additional security thereto, and to secure a preëxisting debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davie, Davidson, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Granville, Halifax, Harnett, Hertford, Hyde, Iredell, Johnston, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pender, Pamlico, Person, Pitt, Polk, [Randolph] Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Transylvania, Tyrrell, Union, Vance, Wake, Watauga, Washington, Wayne and Wilson: North Carolina, . . . . . County.

Whereas, . . . . . ha. . . . . agreed to make advances to . . . . . for the purpose of enabling said . . . . . to cultivate the lands herein-after described during the year 19.., the amount of said advances not to exceed . . . . . dollars; and,

Whereas, said . . . . . is indebted to said . . . . . in the further sum of . . . . . dollars now due; now, therefore, in order to secure the payment of the same the said . . . . . do hereby convey to said . . . . . all the crops of every description which may be raised during the year 19.. on the following the lands in . . . . . County, North Carolina, . . . . . Township, adjoining the lands of . . . . . and also the following other property, viz.: . . . . .

And if by the . . . . . day of . . . . ., 19.., said . . . . . fail . . . . . to pay said indebtedness, then said . . . . . may foreclose this lien as provided in section two thousand four hundred and eighty-eight of the Consolidated Statutes or otherwise, and may sell said crops and other property after ten days notice posted at the courthouse door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance, and pay the surplus to said

....., and the said ..... hereby represents that said crops and other property are the absolute property of ..... and free from encumbrance .....

Witness ..... hand ..... and seal, ..... this the ..... day of ....., 19..

Witness: .....

....., owner of the lands described in the foregoing instrument, in consideration of the advances to be made, as therein provided, do ..... hereby agree to waive and release my lien as landlord upon said crops to the extent of said advances made to said .....

This the ..... day of .....

Witness: .....

..... (Seal.)..

North Carolina, ..... County.

The due execution of the foregoing instrument was this day proven before me by the oath and examination of ....., the subscribing witness thereto.

This the ..... day of ....., 19...

..... (Seal.)

North Carolina, ..... County.

The foregoing certificate of ....., a ..... of ..... County, is adjudged to be correct. Let the instrument with the certificate be registered.

This the ..... day of ....., 19..

....., Clerk Superior Court.

(Rev., s. 1055; 1899, cc. 17, 247; 1901, cc. 329, 704; 1903, c. 489; 1905, cc. 226, 319; 1907, c. 843; 1909, c. 532; P. L. 1913, c. 49; 1925, c. 285, s. 1.)

#### ART. 10. LIENS FOR INTERNAL REVENUE

##### § 2492 (a). Filing notice of lien.

Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the register of deeds of the county or counties within which the property subject to such lien is situated. (1924, c. 44, s. 1.)

##### § 2492 (b). Duty of register of deeds.

When a notice of such tax lien is filed, the register of deeds shall forthwith enter the same in alphabetical Federal lien tax index to be provided by the board of county commissioners, showing on one line the name and residence of the taxpayer named in such notice, the collector's serial number of such notice, the date and hour of filing, and the amount of tax and penalty assessed. He shall file and keep all original notices so filed in numerical order in a file or files to be provided by the board of county commissioners and designated Federal tax lien notices. This service shall be performed without fee. (1924, c. 44, s. 2.)



**§ 2492 (c). Certificate of discharge.**

When a certificate of discharge of any tax lien, issued by the collector of internal revenue or other proper officer, is filed in the office of the register of deeds where the original notice of lien is filed, said register of deeds shall enter the same with date of filing in said Federal tax lien index on the line where the notice of the lien so discharged is entered, and permanently attach the original certificate of discharge to the original notice of lien. This service shall be performed without fee. (1924, c. 44, s. 3.)

**§ 2492 (d). Purpose of article.**

This article passed for the purpose of authorizing the filing of notices of liens in accordance with the provisions of section three thousand one hundred eighty-six of the Revised Statutes of the United States, as amended by the act of March fourth, one thousand nine hundred thirteen, thirty-seven Statutes at Large, page one thousand sixteen. (1924, c. 44, s. 4.)

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**CHAPTER 49 (A)****LOCAL DEVELOPMENT****§ 2492 (e). Purposes of chapter.**

The mayor and board of aldermen, or other governing body of any city, or the governing body of any incorporated town, or the county commissioners of any county, may annually set apart and appropriate from the funds derived annually from the general taxes levied and collected in such city, incorporated town, or county, an amount not less than one-fortieth of one per cent, nor more than one-tenth of one per cent, upon the assessed valuation of all real and personal property taxable in any such city, incorporated town, or county, which funds shall be used and expended under the direction and control of the mayor and board of aldermen, or other governing body of such city, or the governing body of any incorporated town, or the county commissioners of any county, under such rules and regulations or through such agencies as they shall prescribe, for the purpose of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city, or incorporated town or in such county; encouraging the building of railroads thereto, and for such other purposes as will, in the discretion of the mayor and board of aldermen, or other governing body of any city, or the governing body of any incorporated town, or the county commissioners of any county, increase the population, taxable property, agricultural industries and business prospects of any city, incorporated town, or any county. (1925, c. 33, s. 1.)

**§ 2492 (f). Ratification or petition of voters required.**

No city, incorporated town, or county, shall raise or appropriate money under this chapter unless and until this act shall have been approved by a majority of the qualified voters of such city, incorporated town, or county, at an election as provided in this chapter; or by a petition of the registered voters in any town of less than three thousand inhabitants, as provided in this chapter. (1925, c. 33, s. 2.)

**§ 2492 (g). Election to adopt chapter.**

The mayor and board of aldermen, or other governing body of any city, or the governing body of any incorporated town, or the county commissioners of any county, may at any time by ordinance call a special election for the purpose of submitting the question of the approval of this chapter to the voters of such city, incorporated town, or county. In said ordinance said board of aldermen, or other governing body of any city, or town, or said county commissioners, shall specify the time of holding the election and determine and set forth whether or not there shall be a new registration of the voters for such election. Notice of the registration of the voters and of the election shall be given, the voters shall be registered, the election shall be held, the returns shall be canvassed, and the results shall be determined, declared and published under and pursuant to the provisions of section two thousand nine hundred and forty-eight of chapter one hundred and six, extra session, one thousand nine hundred and twenty-one, known as the Municipal Finance Act, and as therein provided for an election upon a bond ordinance providing for the issuance of bonds for a purpose other than the payment of necessary expenses of a municipality. A ballot or ballots shall be furnished to each qualified voter at said election. The ballots for those who vote in favor of this chapter shall contain the words "for the act to aid in the development of any city, incorporated town, or county," and the ballots for those who vote against this chapter shall contain the words "against the act to aid in the development of any city, incorporated town, or county." Except as otherwise provided in said section two thousand nine hundred and forty-eight, chapter one hundred and six, Public Laws, extra session, one thousand nine hundred and twenty-one, the registration and election shall be conducted in accordance with the laws then governing elections for municipal or county officers in such municipality or county, and governing the registration of the electors for such election of officers. (1925, c. 33, s. 3.)

**§ 2492 (h). Action to invalidate election; limitation.**

No right of action or defense founded upon the invalidity of the election shall be asserted, nor shall the validity of the election be open to question in any court upon any ground whatever, except in



an action or proceeding commenced within thirty days after the publication of the statement showing the result of the election. (1925, c. 33, s. 4.)

### **§ 2492 (i). Petition to adopt chapter in certain towns.**

In any incorporated town of less than three thousand inhabitants, in lieu of an election as herein provided, the will of the voters may be determined by a petition in writing giving approval of this chapter, which petition shall be signed by at least three-fourths of all the registered voters of said municipality whose names appeared upon the registration books of the municipality for the election of municipal officers next preceding the time of the filing of said petition: *Provided*, that such three-fourths of the voters shall be the owners of at least seventy-five per cent of the total taxable property of said town, as shown by the assessed valuation, and the tax lists of such town as last fixed for municipal taxation. The residence address of each signer shall be written after his signature; each signature to the petition shall be verified by a statement (which may relate to a number of signatures) made by some adult resident freeholder of the municipality, under oath before an officer competent to administer oaths to the effect that the signature was made in his presence, and is the genuine signature of the person whose name it purports to be. The petition need not be all on one sheet, and if on more than one sheet, it shall be verified as to each sheet. The board of aldermen or other governing body of said town shall canvass said petition and shall include in their canvass the voters signing the petition, and the number of voters upon the registration books and qualified to sign the petition, and the assessed valuation at last fixed for municipal taxation of the property owned by the voters signing the petition, and the entire assessed valuation of property within the town, and shall judiciously determine and declare the result of the canvass of said petition, and shall prepare and publish a statement of the result, and publish the same as required in the case of an election by ballot under this chapter. The same limitation upon the right of action or defense founded upon the invalidity of the petition shall apply in the case of an election by ballot under this chapter. (1925, c. 33, s. 5.)

### **§ 2492 (j). Effect of adoption of chapter.**

If and when this chapter shall have been approved by the voters of any city, incorporated town, or county, at an election or by petition as provided by this chapter, then and thereafter the governing body of such city, or incorporated town, or the county commissioners of such county, may raise by taxation and appropriate money within the limits and for the purposes specified in this chapter. (1925, c. 33, s. 6.)

### **§ 2492 (k). Constitutionality, application.**

If any clause, sentence, paragraph or part of this chapter shall

for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this chapter, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which said judgment shall have been rendered: *Provided*, that Pamlico County be exempted from the provisions of this chapter. (1925, c. 33, s. 7.)

## CHAPTER 50

### MARRIAGE

#### ART. 1. GENERAL PROVISIONS

##### § 2497. Marriages between slaves validated.

See notes of *Bowman v. Howard*, 182 N. C. 662, 110 S. E. 98, under section 279.

#### ART. 2. MARRIAGE LICENSE

##### § 2498. Solemnization without license unlawful.

**Actual Delivery.**—This section, requiring that a minister or officer shall not perform the marriage ceremony “until there is delivered to him a license for the marriage,” is in pursuance of a public policy and requires an actual and not a constructive delivery of the license to the officer or minister before he shall perform the ceremony, and a mailing of the license before the performance of the ceremony, though the officiating officer had been assured thereof by telephone from the register of deeds, is not such delivery as will protect the justice of the peace from the penalty imposed by C. S., 2499. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628.

**Statute of Limitations.**—A summons was issued to recover the penalty against a justice of the peace, C. S., 2499, for performing the marriage ceremony without the delivery of the license therefor to him, required by this section, within less than a year from the time he had performed it, it was held, that the plea of the statute of limitations, C. S., 443 (2), could not be sustained. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628.

##### § 2499. Penalty for solemnizing without license.

##### § 2500 (b). Certificates executed by what physicians.

Such certificate shall be executed by some reputable physician licensed to practice medicine and surgery in the State of North Carolina, whose duty it shall be to examine such applicants and issue such certificate without charge: *Provided, however*, that no such certificate shall be valid outside of the county in which such physician resides the same shall be accompanied by a certificate of the clerk of the Superior Court of the county in which such physician resides to the effect that the person who signed such certificate is a reputable



physician and surgeon actually engaged in the practice of his profession. (1925, c. 296, s. 2.)

**Editor's Note.**—By the act of 1925 the provisions as to physicians living near county lines and in cities, partly in two counties, were omitted and the present requirement substituted.

### § 2503. Penalty for issuing license unlawfully.

**What Constitutes Reasonable Inquiry.**—It is not of a sufficient or reasonable enquiry, under the provisions of this section, as a matter of law, for the register of deeds to issue a marriage license for a woman under eighteen years of age without the consent of her father, upon the examination of the prospective bride and groom, whom he did not know and had never seen before, and a third person, whom he had seen a time or two, the first time about two weeks before, and whose character he did not know or enquire into, and erroneously assumed to be good, and that the woman was of the required age judging by her appearance; and the fact that he had required an affidavit from the prospective groom, and interested party, does not affect the result. *Snipes v. Wood*, 179 N. C. 349, 102 S. E. 619.

**Same—Question of Law or Fact.**—Reasonable inquiry, within the meaning and intent of this section, is a question of law for the court upon facts admitted or found by the jury. If the facts are admitted, it is the duty of the court to instruct the jury whether they are sufficient to constitute reasonable inquiry; if they are in controversy, it is the duty of the court to instruct the jury that certain facts to be determined from the evidence do or do not constitute reasonable inquiry. *Spencer v. Saunders*, 189 N. C. 183, 126 S. E. 420.

Where the facts are not disputed in an action against a register of deeds to recover the penalty under this section, the reasonableness of the enquiry may become a matter of law for the court. *Snipes v. Wood*, 179 N. C. 349, 102 S. E. 619.

In an action to recover of the register of deeds of a county the penalties allowed by this section, if the evidence is conflicting as to the reasonableness of the inquiry made by the register, the question should be submitted to the jury, and a judgment as of nonsuit thereon is erroneously entered. *Lemmons v. Sigman*, 181 N. C. 238, 106 S. E. 764.

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## CHAPTER 51

### MARRIED WOMEN

#### ART. 1. POWERS AND LIABILITIES OF MARRIED WOMEN

### § 2506. Property of married woman secured to her.

As to suits of wife, see notes to section 454.

### § 2507. Capacity to contract.

See notes to section 2513.

**Effect on Rights of Husband.**—By virtue of the statutes giving married women separate property rights and the right to sue for injuries, the husband is deprived of his former rights in her property and choses in action. *Hinnant v. Tidewater Power Co.*, 189 N. C. 120, 126 S. E. 307.

The practical effect of this section is to constitute a married woman a free trader as to all her ordinary dealings, and to invest her with the privileges of suing and being sued alone. *Croom v. Goldsboro Lumber Co.*, 182 N. C. 217, 219, 108 S. E. 735.

**Section Does Not Apply to Estates in Entirety.**—The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. And this section has been construed, in *Jones v. Smith*, 149 N. C. 317, as not affecting estates held by husband and wife as tenants by the entirety. *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566.

**Liability of Wife Where Husband Agent.**—Under this section, a wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence that, while acting as her agent, he proximately caused an injury to a child who found explosive caps negligently left by him while causing her lot to be blasted and excavated on a bordering street. *Krachanake v. Mfg. Co.*, 175 N. C. 435, 95 S. E. 851; *Barnett v. Cotton Mills*, 167 N. C. 580, 83 S. E. 826, cited and applied. *Richardson v. Richardson*, 188 N. C. 112, 123 S. E. 306.

**Estoppel of Wife.**—As to the doctrine of title by estoppel applying to a married woman under the provisions of this section, who has joined with her husband in a deed to his lands with warranty, the wife's interest not appearing on the face of the instrument, but which title the wife afterwards acquired, *Quere?* *Builders, etc., Co. v. Joyner*, 182 N. C. 518, 109 S. E. 259.

## § 2509. Conveyance or lease of wife's land requires husband's joinder.

**Action for Damages for Breach.** — A married woman may be held in damages for the breach of her contract in the lease of her separate lands for more than three years, though her husband has not joined therein or given his written consent thereto. *Miles v. Walker*, 179 N. C. 479, 102 S. E. 884. The opinion in this case draws the distinction between suits for specific performance on the leases mentioned in this section and actions for damages on same. Ed. Note.

## § 2513. Earnings and damages from personal injury are wife's property.

See notes to sections 454 and 2507.

**Services Rendered to Husband.**—For wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living together under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to do so. *Dorsett v. Dorsett*, 183 N. C. 354, 111 S. E. 541.

**Husband and Wife Employed Together.**—Since the passage of the Martin Act, section 2507 and this section the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay a husband and wife each a certain and different amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services. *Croom v. Goldsboro Lumber Co.*, 182 N. C. 217, 108 S. E. 735.

**Joinder of Husband Not Improper.**—While the husband is not a necessary party to his wife's action to recover for the value of her services rendered upon a quantum meruit, under this section, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a quantum meruit, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause with direction that the allegations of the complaint as to the statement of the husband's cause be stricken out and the action of the wife proceeded with. *Shore v. Holt*, 185 N. C. 312, 117 S. E. 165.



**Action of Wife for Tort to Husband.**—In *Hipp v. Dupont*, 182 N. C. 9, 13, 108 S. E. 318, the court said: "It follows therefore (from this section) that the husband cannot sue to recover his wife's earnings, or damages for tort committed on her and there is no reason why she can sue for tort or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. We agree with the learned counsel for the plaintiff that if the husband could maintain an action to recover damages for torts on the wife she would be able to maintain an action on the account of torts sustained by the husband. Such right of action if it existed in favor of the husband should exist in favor of the wife. It should be in favor of both, or neither, but in view of the constitution of 1868 and our statute on the subject, we think that such action cannot be maintained by either on account of the injury to the other."

**Torts between Husband and Wife.**—Defendant contends that this section is not sufficiently inclusive in its terms to extend to a personal injury or tort sustained by one spouse from the other. In reply to this, it may be observed that the right of a wife to sue her husband, under section 454, is not limited by any provision of the statute to actions involving the rights of property only. Hence, considering the two sections together, there is no difficulty in arriving at the conclusion that the plaintiff's right to maintain this action is an entirely permissible construction. *Crowell v. Crowell*, 181 N. C. 66, 68, 106 S. E. 149.

## § 2515. Contracts of wife with husband affecting corpus or income of estate.

See notes to § 1667.

**Applicable to Contracts Only.**—In *Rea v. Rea*, 156 N. C. 530, 72 S. E. 573, it is said: "An examination of this section shows that it applies solely to contracts, and not to conveyances; indeed, the word 'contract' is used 5 times in the section, besides in the heading. The object of the Legislature was clearly to prevent the wife making any contract with her husband whereby she should incur liability against her estate which in future might prove a burden or charge upon it or cause a charge upon or impairment of her income or personalty. To that end not only a privy examination was required, but the certificate of the magistrate that the contract was not unreasonable or injurious to her. This provision does not attempt to add as to conveyances by her (as to which the act of 1911 retains the constitutional restrictions in regard to realty, that there must be the written assent of the husband and statutory privy examination), any further restriction, such as the approval of a third person. Adding that if it did it would be unconstitutional," quoted, *Butler v. Butler*, 169 N. C., 597, 86 S. E. 507. Concurring opinion of Clark C. J. in *Frisbee v. Cole*, 179 N. C. 469, 475, 102 S. E. 890. This concurring opinion seems to be in conflict with many of the cases which follow in this note. Ed. note.

If this section extended to conveyances, it would be a violation of that provision of the Constitution by adding the requirement that some third party, a magistrate or other official, must give his wise approval before she can do what the Constitution guarantees that she may do "with the approval of her husband." Concurring opinion Clark, C. J. in *Frisbee v. Cole*, 179 N. C. 469, 475, 102 S. E. 890.

**Applicable to Deeds in Trust for Husband.**—This section is applicable not only to a deed by a wife conveying land to the husband but also to a deed to another in trust for the husband. *Best v. Utley*, 189 N. C. 356, 127 S. E. 337.

**Applicable to Wife's Interest in Estate by Entireties.**—During the continuance of the joint lives of the husband and wife, who have acquired an estate by entireties, the wife's interest in the lands is such as is contemplated by this section and where the estate has been conveyed to one

in trust for them both, and the officer in taking the acknowledgment of the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify, that the instrument was not unreasonable or injurious to her, the instrument itself is void, and he may not, by will or otherwise, dispose of her interest thereunder. *Davis v. Bass*, 188 N. C. 200, 124 S. E. 566.

**Defective Paper Good as Color of Title.**—A paper writing void for failure of compliance with this section is good as color of title. *Best v. Utley*, 189 N. C. 356, 127 S. E. 337.

A deed of her own lands from the wife to her husband, not certified to by the probate officer that it was "not unreasonable or injurious to her" pursuant to this section, is void as a conveyance, though it may be regarded as color of title, and ripen the title in seven years under sufficient adverse possession for that period of time. *Whitten v. Peace*, 188 N. C. 298, 124 S. E. 571.

**Wife Free Trader—No Examination — Section 3351.**—See notes to section 3351.

Section 3351 does not affect this section, requiring the additional certificate in deed of wife of her separate realty to her husband. *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834.

**Statement of Officer.**—This section only requires that the officer taking the probate of a deed to lands from a wife to her husband shall state his conclusions that the contract or deed "is not unreasonable or injurious to her," and it will be conclusively presumed that it was upon sufficient evidence, and where the statutory requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud, as other judgments may be" so attacked; as where the purchaser from the husband refuses to accept his deed upon the ground that the husband, having a short time previously conveyed the lands to his wife, her reconveyance was necessarily "unreasonable or injurious to her." *Frisbee v. Cole*, 179 N. C. 469, 102 S. E. 890.

Evidence is not admissible to show that the facts stated in the certificate are not true. *Best v. Utley*, 189 N. C. 356, 127 N. C. 337.

**Amendment of Defective Certificate.** — Where the certificate required by this section is defective, it cannot be subsequently amended so as to render a deed valid, at least after the death of the wife. *Best v. Utley*, 189 N. C. 356, 127 S. E. 337.

**New Certificate.**—Where a justice of the peace has failed to certify his finding that the deed of the wife's lands to her husband and herself to be held by them in entirety was not "unreasonable or injurious to her," as required, among other things, by this section, he may not, after the death of the wife, validate the deed by making a new certificate including this vital finding as of the time of his first probate, or excuse himself upon the ground of ignorance or inadvertence, it being at least required that she should have had due notice of this proposed action, and have been afforded an opportunity to be heard; and the deed itself being void under the statute, the will of the husband disposing of the locus in quo is also ineffectual. *Semble*, after executing the first certificate, the power of the justice ceased or became *functus officio*; but this point is not herein decided. *Smith v. Beaver*, 183 N. C. 497, 11 S. E. 852.

**Probate or Acknowledgment — Proof of Deed.** — Where the husband joins with his wife in the execution of a deed to her lands, and it is certified that he had assented thereto at that time, the objection to the probate of the husband that it was taken after his wife's death is untenable, for the probate or acknowledgment is not the execution of the deed, but the proof thereof. *Frisbee v. Cole*, 179 N. C. 469, 102 S. E. 890.

**Noncompliance Renders Deed Void.**—In order for a married woman to make a valid conveyance of her separate real property to another than



her husband, it is required by our statute that it must be with the written assent of her husband, and when the conveyance thereof is direct to her husband, it is further required by this section that the probate officer certify that it is not unreasonable or injurious to her and when this statutory requisite has been omitted, the deed of the married woman to her separate realty is void. *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834.

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## CHAPTER 52

### MILLS

#### ART. 4. RECOVERY OF DAMAGES FOR ERECTION OF MILL

##### § 2555. Action in superior court; procedure.

**In General.**—In *Kinsland v. Kinsland*, 186 N. C. 760, 761, 120 S. E. 358, the Court said: "In sections 2555, 2557, and 2558, Consolidated Statutes, provision is made for obtaining relief where one conceives himself, damaged by the erection of a grist-mill or mill for other useful purpose, and ordinarily, in cases to which the statute applies, the remedy given must be pursued. The history of this legislation and the reason for it, together with an interpretation of its meaning and purpose, appears in *Hester v. Broach* 84 N. C. 253, and other cases on the subject."

##### § 2556. When dams abated as nuisances.

**When Applicable.**—This section, applies where water is ponded upon the plaintiff's land by a dam constructed on the property of another or where a trespass of like character is committed, because at common law an action could be brought each day so long as the trespass continued. But the statute does not apply and was never intended to apply to an actual entry upon the complainant's premises and the construction thereon of a dam for the purpose of ponding water and retaining possession. *Kinsland v. Kinsland*, 188 N. C. 810, 811, 125 S. E. 625.

**When Demand and Allegation of Insolvency Unnecessary.**—The demand for damages in the complaint for ponding water upon and injuring the lands of the upper proprietor required by this section, is not necessary when the relief sought is to enjoin the maintenance of a dam on the plaintiff's own land by the defendant's trespass thereon, and the abatement of the nuisance thus caused, and the trespass being continuing, the allegation of defendant's insolvency is not necessary for the continuance of the restraining order to the final hearing before the jury. *Kinsland v. Kinsland*, 188 N. C. 810, 125 S. E. 625.

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## CHAPTER 54

### MORTGAGES AND DEEDS OF TRUST

#### ART. 3. MORTGAGE SALES

##### § 2587. Foreclosure of conditional sales.

A contract for the sale of personal property, retaining title in the vendor until the purchase price has been paid, without express power of sale therein, comes under the provisions of this section, as if written in the contract,

and gives to the vendor the right to sell the property in default of payment of the purchase price, or part thereof, without consent of court, upon certain advertisement specified in the statute; and it is reversible error for the court to charge the jury that the vendor could not sell the property without the consent of the purchaser. *House v. Parker*, 181 N. C. 40, 106 S. E. 137.

### § 2588. Real property; notice of sale must describe premises.

The purpose and intent of this section was to give complete and full notice to the public of the land to be sold, so that the public generally would know and understand from the advertisement the exact property offered for sale. *Douglas v. Rhodes*, 188 N. C. 580, 583, 125 S. E. 261.

**Applicable to Deed in Trust or Mortgage.**—Under a fair construction of this section, it is applicable to a sale under the power in a deed in trust or mortgage. The notice required by law under the statute would be the notice in the deed in trust or mortgage. *Douglas v. Rhodes*, 188 N. C. 580, 582, 125 S. E. 261.

**The Word "Substantially".**—In *Douglas v. Rhodes*, 188 N. C. 580, 583, 125 S. E. 261, the Court said: "If the legislature had intended that the real estate (set forth by metes and bounds in the deed of trust in the present case) in a deed of trust or mortgage should be described by metes and bounds when advertised for sale under the terms of the deed of trust or mortgage, it could have easily said so in the statute, but on the contrary it used the word 'substantially.' The word 'substantially,' Webster defines to mean: 'In a substantial manner, in substance, essentially.' It does not mean an accurate or exact copy."

**Same—Sufficient Description.**—Advertisements for the sale of land under foreclosure of mortgage or deed of trust are required by this section to describe the lands "substantially" as in the conveyance thereof; and while it may be more advisable to give the exact description, the deed made in pursuance thereof is not necessarily void for lack of such description, as where the land is designated as a well-known and certain tract, or place of business, or manufacturing plant, with reference to the book in the office of the register of deeds where the description is given, with number of page, etc., for a more particular description, it is a sufficient description of the land and will convey the title if the notice of such has been published in accordance with the terms of mortgage or deed in trust. *Douglas v. Rhodes*, 188 N. C. 580, 125 S. E. 261.

### § 2591. Reopening judicial sales, etc., on advanced bid.

**Status Under Section of Mortgage Sales and Deeds of Trust.**—Under this section a sale of land under the power in a mortgage or deed of trust is given the same status as if made under a judgment or decree of court. *Pringle v. Winston-Salem Building, etc.*, Ass'n, 182 N. C. 316, 108 S. E. 914.

**Purpose of Section as to Mortgagors.**—This section was intended for the protection of mortgagors where sales are made under a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10 per cent, had been deposited in court. There being no such protection as to mortgagors, whose property had been sold under power of sale without a decree of foreclosure, the same opportunity of a resale when there has been an increased bid of 10 per cent when the bid at the first sale did not exceed \$500, and of 5 per cent when the bid of the first sale was more than \$500. *Pringle v. Winston-Salem Building, etc.*, Ass'n, 182 N. C. 316, 317, 108 S. E. 914.

**Section Incorporated in Mortgages and Deeds of Trust.**—The provisions of this section, concerning the sale of land under a power thereof contained in a mortgage or deed of trust, enter into and control the sale



under such instruments. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

**Bargain Incomplete Until Expiration of Ten Day Period.**—The principle upon which specific performance of a binding contract to convey lands is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the ten days allowed by this section, in which an increase of bid may be received and a resale ordered, for, within that time, there is no binding contract of purchase, and the bargain is incomplete. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

**Same—Title of the Bidder.**—Under the provisions of this section, requiring that a sale of land under a mortgage or deed of trust be left open for ten days for the acceptance of an increased bid, under certain conditions, and a resale of these conditions are complied with, the bidder at the sale during such period acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Before the expiration of the ten days required by this section, for the sale of land under a mortgage or deed of trust, the sale shall not be deemed closed and the successful bidder thereat acquires no title or right of possession during that time, but is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

**Power and Authority of Clerk.**—This section, does not require that all sales of land under mortgage or deed in trust be reported to the clerk of the court, but only when an advanced bid has been made and is properly safeguarded or paid into the office of the clerk of the court. *Pringle v. Winston-Salem Building, etc., Ass'n*, 182 N. C. 316, 108 S. E. 914. See also *In re Sermon's Land*, 182 N. C. 122, 108 S. E. 497.

The supervisory powers invested in the clerk of the court over sales under mortgage, deed of trust, etc., are not those of general control as exercised by the courts in case of an ordinary judicial sale, but confined by the statute to sales, and resales under the power of sale contained in the instruments, and in accordance with the directions of the statute. *Lawrence v. Beck*, 185 N. C. 196, 116 S. E. 424.

While under the provisions of this section, it is required that the clerk order title to be conveyed to the purchaser at the final resale, *semble*, this order is merely ministerial when the resale has been made in accordance with the statute in other respects, and the omission may be supplied by the clerk making the order *nunc pro tunc*, and the deed accordingly made will convey the title to the purchaser. *Lawrence v. Beck*, 185 N. C. 196, 116 S. E. 424.

**Same—When Supervisory Power Begins.**—The clerk of the court acquires supervisory power of the sale of land under power contained in a mortgage or deed of trust from the time of an advanced bid paid into his hands, under the provisions of this section, which continues until after the final sale under foreclosure. *Lawrence v. Beck*, 185 N. C. 196, 116 S. E. 424.

**Same—Where Property Injured Within Ten Day Period.**—This section, controls as to ordering a resale of lands sold under a power of sale contained in a mortgage or deed of trust, and confers no power on the clerk to make such order, unless within ten days allowed there shall be an increased bid, etc., and does not extend to instances wherein a material loss has been sustained by destruction of a house on the lands, within the stated period. In re Sermon's Land, 182 N. C. 122, 108 S. E. 497.

Where the mortgaged premises has been materially diminished in value by the loss by fire of a house thereon, which has been sold under a power contained in the instrument, the bidder at such sale having no title or right of possession, or control over the property for its preservation or

protection, within ten days provided by this section, the loss occurring within that time falls on the owner, and the preferred bidder is not chargeable therewith, or required by law to take the property at the price he had bid therefor. *In re Sermon's Land*, 182 N. C. 122, 108 S. E. 497.

**Same—Effect of Cash Stipulated at First Sale.**—Under the provisions of this section, the clerk of the court has no jurisdiction, except to order a resale of land sold under the power of sale of a mortgage, when, within the ten days required by the statute, the bid at the sale has been raised; and a mere statement made at the foreclosure sale that the purchase price be paid in cash upon confirmation, implies only that the cash would be required if the bid should not be raised in the amount and time prescribed by law. *In re Mortgage Sale of Ware Property*, 178 N. C. 693, 122 S. E. 660.

**Irregularity in Conveyance.**—Where a trust deed to secure money loaned on lands has been foreclosed, this section requires the sale to be kept open for ten days for the tender increased bids, etc., but on the facts of this appeal it appears that an irregularity in conveying the land before the expiration of the statutory time could not have prejudiced any of the parties, and, also, that they are concluded by the judgment upholding the validity of the transaction. *Wise v. Short*, 181 N. C. 320, 107 S. E. 134.

**Striking Out Order for Resale.**—Where, on account of an upset bid, an order for a resale has been entered, it is error, eleven days thereafter to strike out such order and declare the sale final in prejudice of further rights of mortgagors. *Va. Trust Co. v. Powell*, 187 N. C. 372, 127 S. E. 242.

**Commissions Allowed.**—Upon the ordering by the clerk of the court of a resale of lands sold under the power contained in a mortgage or deed of trust, pursuant to this section, the original sale, under the power, becomes a nullity, and that part of the instrument providing a certain per cent as selling commission to the mortgagee or trustee is inoperative; and in lieu thereof he is entitled only to the costs and expenses of the sale and such sum to compensate him for his services actually rendered as may be approved by the clerk, subject to review on appeal, or by the court direct where a restraining order has issued. *Pringle v. Winston-Salem Building, etc., Ass'n*, 182 N. C. 316, 108 S. E. 914.

**Jurisdiction of Judge on Appeal.**—The discretion vested in the Superior Court judge on appeal from the clerk, C. S., 637, to hear and determine the matter in controversy, unless it appear to him that justice would be more cheaply or speedily administered by remanding it to the clerk, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority under this section, to further pass thereon in the absence of an increased bid. *In re Mortgage Sale of Ware Property*, 187 N. C. 693, 122 S. E. 660.

**Appeal will be dismissed** when the clerk has not complied with the provisions of this section. *In re Sermon's Land*, 182 N. C. 122, 108 S. E. 497.

## § 2592. Surplus after sale to be paid to clerk in certain cases.

**Alternatives of Mortgagee.**—Where the owner of lands has mortgaged the same during his life as tracts numbered 1 and 2, and has later conveyed tract No. 2 to a purchaser in fee simple, and has devised tract No. 1 for life with remainder over. It was held, that the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who may determine whether the surplus be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of the statute, C. S., 1791, or the mortgagee may relieve of liability by paying the fund into court pursuant to this section. *Brown v. Jennings*, 188 N. C. 155, 124 S. E. 150.



## ART. 4. DISCHARGE AND RELEASE

**§ 2594. Discharge of record of mortgages and deeds of trust.**

**Construed as a Whole.**—This section will be construed to effectuate the legislative intent as gathered from its language, and by harmonizing its various parts when this can reasonably be done. *Richmond Guano Co. v. Walston*, 187 N. C. 667, 122 S. E. 663.

**Mortgagee Alone May Cancel.**—Only the mortgagee is entitled to have his mortgage canceled on the book in the office of the register of deeds, either in person, by subsection 1 of this section, or by the register of deeds upon the exhibition of the mortgage and note properly endorsed by him, by subsection 2 and 3; and when the mortgagee cancels the instrument in person, under subsec. 1, it is a complete release and discharge of the mortgage, under subsec. 4, for in such case the statute does not require the exhibition of the mortgage and the note it secures. *First Nat. Bank v. Sauls*, 183 N. C. 165, 110 S. E. 865.

Under this section there is no authority given to the register of deeds to enter cancellation of record upon the cancellation thereof by the mortgagor. *Faircloth v. Johnson*, 198 N. C. 429, 127 S. E. 346.

Where a note, secured by a mortgage, is assigned and pledged as collateral by the mortgagee to his own note, without an assignment of the mortgage conveying title for the purpose of the security, but which was only left with the payee of his note, the legal title to the lands remains in the mortgagee, who alone is authorized to cancel the mortgage. *First Nat. Bank v. Sauls*, 183 N. C. 165, 110 S. E. 865.

The legal title to mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until transferred or assigned, for the purpose of the security or the cancellation of the instrument, under this section and where the mortgagor has afterwards conveyed the fee-simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price of which the same mortgagee becomes the holder, his personal cancellation of the first mortgage, without producing it or the note it secures, is a complete discharge or release of the lien thereof, and where he borrows money after such cancellation, and hypothecates the note of the second mortgage as collateral to his own, the lender for the purposes of the security, acting in good faith, has a prior lien on the lands. *First Nat. Bank v. Sauls*, 183 N. C. 165, 110 S. E. 865.

**Subsection 2—Payee or Mortgagee Must Be Sui Juris.**—In order to constitute a valid cancellation under subsection 2, this section clearly contemplated a payee or mortgagee who is sui juris. *Faircloth v. Johnson*, 189 N. C. 429, 127 S. E. 346.

**Same—Applies to Deeds of Trust.**—This subsection does not exclude from the intent and meaning of the statute a deed of trust given for the purpose of securing a loan of money. *Richmond Guano Co. v. Walston*, 187 N. C. 667, 122 S. E. 663. It was contended in this case that the omission of words "deed of trust" from the provision near the end of the subsection, namely, "that the register or his deputy shall cancel the mortgage or other instrument," conclusively shows that a register is not given power to cancel a deed of trust. However, the court did not assent to this rather ingenious argument, the gist of their conclusions being as follows: Considering this section as a whole the natural and reasonable interpretation of the language must refer the words "mortgage or other instrument" in the clause quoted above to the words of the first line of the subsection, "mortgage, deed of trust or other instrument."

**Same—Effect of Prior Fraud.**—Where the register of deeds has entered "satisfaction" of a deed of trust to secure borrowed money upon the margin of his registration book, upon the exhibition of the proper endorsement on the note and deed of trust by the payee, and thereupon subsequent mort-

gagees, etc., have acted in good faith, the prior fraud or collusion of the parties to the canceled instrument will not affect their rights when they were unaware thereof or had not participated in the fraud. *Richmond Guano Co. v. Walston*, 187 N. C. 667, 122 S. E. 663.

**Subsection five** is not to be construed retroactively so as to affect those who became creditors prior to its passage. *Hicks v. Kearney*, 127 N. C. 205, 127 S. E. 205.

## CHAPTER 55

### MOTOR VEHICLES

#### ART. 1. GENERAL PROVISIONS

##### § 2599. Violation a misdemeanor.

See notes to section 2601.

**Purpose.**—Our statutes on the subject of regulating the care to be used by those driving motor vehicles upon the State's highways, among them, C. S., 2617, as to the passing without interference; 2618, amended by Public Laws 1921, ch. 98, Extra Session, as to reckless driving, having regard to the width of the highway, traffic thereon, and the various rates of speed in accordance with location in the country, upon streets of cities, towns, etc., this section, making a violation of any of the provisions of ch. 55, C. S., a misdemeanor are to secure the reasonable safety of persons in and upon the highways of the State. *State v. Sudderth*, 184 N. C. 753, 114 S. E. 828.

**In What Trials Evidence of Violations Admissible.**—Where death or great harm results from a violation, evidence that the accused was, at the time charged, violating these provisions may be properly received upon a trial for murder or for manslaughter in appropriate instances, or as evidence of an assault where no serious injury has resulted. *State v. Sudderth*, 184 N. C. 753, 114 S. E. 828.

**Same—Actions for Assault.**—A battery includes an assault, and to constitute an assault it is not necessary that the defendant should have directly struck the one assaulted, for any unlawful touching of the person alleged to have been assaulted, or the setting in motion of any force that is committed through means which ultimately produce this result, and are likely to produce it, is sufficient, and applies when a person driving and automobile upon the State's highway, in consequence of his violating the statutes on the subject, collides with another person driving an automobile thereon which results in a physical jarring of such other person, though he may not have been thrown from his automobile, or struck in any part of his body. *State v. Sudderth*, 184 N. C. 753, 114 S. E. 828.

##### § 2601. No municipal ordinance in conflict.

See note to § 2616.

**Town Ordinances Void.**—Town ordinances regulating automobiles, speed limits, etc., within the town in conflict with the statutes on the subject, C. S., 2599, 2618, are void under the provisions of this section, and apart from the express provisions of the last named section, they must yield to the statute law of the State, such powers being a delegated legislative function. *State v. Freshwater*, 163 N. C. 762, 111 S. E. 161.

##### § 2601 (a). Unlawful display of emblem or insignia.

It shall be unlawful for any person to display on his motor vehicle, or to allow to be displayed on his motor vehicle, any emblem or in-



signia of any organization, association, club, lodge, order, or fraternity, unless such person be a member of the organization, association, club, lodge, order, or fraternity, the emblem or insignia of which is so displayed.

Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine not exceeding fifty dollars (\$50) or imprisonment for a period not exceeding thirty days. (1924, c. 63.)

### ART. 3. LICENSE FEES

#### § 2612. Amount of license fee.

**Effect of Acts of 1917 and 1919 from Which Section Derived.**—Sec. 6, ch. 140, Laws of 1917, entitled "An act to regulate the use of automobiles," required a license or registration fee rated according to horse power, and puts a limit upon the total registration fee authorized to be charged by a municipal corporation, that it should not be greater than one-half the fee required by the State, was repealed by ch. 189, Laws of 1919, being entitled "An act to provide for the construction and maintenance of a system of highways in the State and to enable the State to secure the benefits of Federal Aid therefor and for other purposes," and by sec. 5, raised the license fees to be paid to the State, graduated also as to horse power, and further, that "motor vehicles used for carriage of passengers for hire shall carry a special 'service' license to be issued by the Secretary of State, for which the license fee shall be twice the amount for like motor vehicles for private use," and that "no county, city or town shall charge any license fee on motor vehicles in excess of one dollar per annum." *State v. Fink*, 179 N. C. 712, 103 S. E. 16.

**Power to Tax in Municipal Charter.**—The particular intent expressed in ch. 189, Laws of 1919 from which this section is derived forbidding counties, cities and towns from imposing a license tax in excess of one dollar a year on those running a motor vehicle for hire, controls a general power prior conferred in a municipal charter, to levy a franchise or license tax thereon. *State v. Fink*, 179 N. C. 712, 103 S. E. 16.

Since the passage of ch. 189, Laws of 1919 from which this section is derived, a city ordinance imposing a license tax of over one dollar a year for those running motor vehicles for hire, is void, though authorized by the city's charter, and where the person so operating them has complied with this section, he may not be convicted of the offense imposed by the ordinance. *State v. Fink*, 179 N. C. 712, 103 S. E. 16.

A license tax imposed upon those running an automobile for hire by a municipal ordinance in excess of that allowed by a valid statute is void and unenforceable. *State v. Fink*, 179 N. C. 712, 103 S. E. 16.

The Laws of 1919, ch. 189, from which this section is derived, imposes a privilege tax for operating motor vehicles for private use and for carrying passengers for hire, restricting the imposition of a privilege tax in excess of one dollar a year by a municipality upon each class alike. *State v. Fink*, 179 N. C. 712, 103 S. E. 16.

#### § 2612 (a). Payment of fees to secretary of state; items covered by fee.

The words "any such car" in the third proviso of this section, do not restrict the driver's license to cars on which the privilege tax is laid. This construction would make the one tax entirely dependent upon the levy of the others. *State v. Denson*, 189 N. C. 173, 126 S. E. 517.

## ART. 3(A) GASOLINE TAX

**§ 2613 (d). Monthly reports of purchases and deliveries by dealers; gallon tax on purchases; wholesale dealers.**

In addition to the taxes now provided for by law, each and every dealer, as defined in this article, who is now engaged, or who may hereafter engage, in his own name or in the name of others, or in the name of his representatives or agents in this state, in the sale or distribution as dealers or distributors of motor vehicle fuel as herein defined, shall not later than the twentieth day of each calendar month, render a statement to the secretary of state, showing all motor vehicle fuel purchased for sale and delivered during the preceding calendar month, and pay a license tax of [four] cents per gallon on all motor vehicle fuel so purchased as shown by such statement in the manner and within the time aforesaid: *Provided*, however, that whenever any dealer or distributor of motor vehicle fuel shall show to the satisfaction of the secretary of state, by complying with such rules and regulations as shall be made by the secretary of state for that purpose, that the tax hereby provided to be paid by the dealer or distributor of motor vehicle fuel as aforesaid has been voluntarily paid by the wholesale dealer, then and in that event the reports required by this act to be made by such dealer or distributor, and by the wholesale dealer, shall not be required to be made, and the dealer or distributor shall not be required to pay the tax hereby levied.

Every wholesale dealer selling any motor vehicle fuel in the state shall render to the secretary of state every thirty days a statement of all the sales in the state, which statement shall contain the name and business address of the dealer and the date and amount of such sale. Any wholesale dealer willfully failing to comply with the provisions of this section shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court. (1921, c. 2, s. 33; 1923, c. 263, s. 2; 1925, c. 45, s. 3.)

## ART. 3(B). MOTOR BUSES

**§ 2613 (j). Definitions.**

(a) The term "corporation" wherever used in this article means a corporation, a company, an association or a joint stock association.

(b) The term "person" wherever used in this article means an individual, a firm or a copartnership.

(c) The term "commission" wherever used in this article means the Corporation Commission of the State of North Carolina.

(d) The term "motor vehicle carrier" wherever used in this article means every corporation, or persons or their lessees, trustees or receivers, owning, controlling, operating or managing any motor-propelled vehicle used in the business of transporting persons or prop-



erty for compensation over any improved public highway or streets in this State as hereinafter defined; provided, the term "motor vehicles" or "motor-propelled vehicles" as used in this article shall only include motor vehicles operating a service between different cities or towns.

(e) For the purpose of this article, all vehicles equipped to carry a load which are attached to and drawn by a motor vehicle are hereby defined as trailers and shall be classed as motor vehicles and subject to the provisions of this article.

(f) The term "improved public highway" wherever used in this article means every improved public highway in this State which is or may hereafter be declared to be a part of the State highway system, or any county highway system, or the streets of any city or town. (1925, c. 50, s. 1.)

### § 2613 (k). Application of article.

No corporation or person, their lessees, trustees or receivers, shall operate any motor-propelled vehicle as hereinbefore defined for transportation of persons or property for compensation over any improved public highways in this State, except in accordance with the provisions of this article, and said operation shall be subject to control, supervision and regulation by the commission in a manner provided by this article: *Provided, however*, that nothing in this article contained shall apply to motor vehicles while used exclusively for transporting persons to or from school, Sunday schools, churches or religious services of any kind, or to or from picnics, or to United States mail carriers operating star routes, while engaged solely in carrying mail, or to farmers or dairymen when hauling dairy or farm products; and *provided further*, that except as in this proviso set forth, nothing in this article contained shall apply to motor vehicles employed exclusively in the conduct of educational or sight-seeing excursions or tours from points outside this State to and from points of educational and historic interest in the State of North Carolina, and do not solicit or receive patronage along the route, but such motor vehicle carriers shall be required only to obtain from the commission a permit to operate motor vehicles so employed over the improved public highways of this State, and to pay a license fee of fifty dollars per annum on motor vehicles seating twenty passengers or less, and one hundred dollars per annum on motor vehicles seating more than twenty passengers. (1925, c. 50, s. 2.)

### § 2613 (1). License certificate, application, issuance, contents; limitation of size of vehicles; bond.

Every corporation or person, their lessees, trustees or receivers, before operating any motor-propelled vehicle upon the improved public highways of the State, the counties or cities for the transportation of persons or property for compensation within the purview of this article, shall apply to the commission and obtain a license cer-

tificate authorizing such operation, and such license certificate shall be secured in the manner following:

(a) Application for such permit shall be made by such corporation or person, their lessees, trustees or receivers to the commission and shall specify the following matters:

(1) The name and address of applicant and the names and addresses of its officers if a corporation, and if a corporation, the name of its office in the State, and every such corporation, whether organized under the laws of this State or any other State, shall maintain an office at some town or city along the route on which it proposes to operate.

(2) The public highway or highways over which and the fixed termini on the regular route, if any, between which or over which applicant intends to operate.

(3) The kind of transportation, whether passenger or freight, or both, in which applicant intends to engage, together with a brief description of each vehicle which applicant intends to use, including the seating capacity thereof if for passenger traffic, or tonnage if for freight traffic, and including the size and weight of said vehicles.

(4) The proposed time schedule of operation.

(5) The schedule of tariff showing the passenger fares or freight rates proposed to be charged between the several points or localities to be served.

(6) Whether or not the said applicant is or has been operating on said route or other routes in the State and for what length of time and upon what time schedule of operation and upon what schedule of tariff for passenger fares or freight rates.

(b) Upon the filing of said application, the commission may in its discretion fix a time and place for the hearing of said application, which time shall not be less than five days subsequent to the filing of said application. When the time and place for the hearing has been fixed, the applicant shall at least three days prior to said hearing cause to be published in a newspaper of general circulation in the territory to be served a notice reciting the fact of the filing of said application, together with a statement of the time and place of the hearing of said application.

(c) At the time specified in said notice or at such time as may be fixed by the commission, a public hearing upon said application shall be held by said commission, provided that in granting application for certificates, the commission may take into consideration the length of time the applicant has operated a schedule motor vehicle service between the termini named in the application; the general standard of the service maintained during this period; the reliability of the applicant and his sense of responsibility toward the public as shown during the period of his operation; his court record and any other matters tending to qualify or disqualify him as a common car-



rier. After such hearing the said commission may issue the license certificate or refuse the same, or may issue the same with modifications and upon such terms and conditions as in its judgment the public convenience and necessity may require.

(d) Each license certificate issued under the provisions of this article shall contain the following matters:

(1) The name of the grantee.

(2) The public highway or highways over which and the fixed termini between which the grantee is permitted to operate.

(3) The kind of transportation, whether passenger or freight, in which the grantee is permitted to engage, and the time schedule of operation.

(4) The term for which the license certificate is granted, which term shall be for three years from its date.

(5) Such additional matters as said commission may deem necessary or proper to be inserted in said license certificate. No license certificate issued under the provisions of this article may be assigned or transferred or hypothecated in any way without the consent of the commission. Every licensed certificate issued by the commission under the provisions of this article, before same is valid, shall bear the certificate of the Secretary of State, certifying that the tax imposed by this article has been paid and the bond required by this article has been given by the applicant and has been approved.

(6) Before granting the license certificate to an applicant for operation of passenger or freight motor-propelled vehicles over the highways of the State or any county, the commission shall request and the Highway Commission of the State shall furnish to such commission its recommendations as to the size and weight of the motor-propelled vehicles and the type of tires with which said motor-propelled vehicle carriers may be equipped, which may be safely operated over said highways and may be operated over the same without greatly damaging them, and such recommendations made by the Highway Commission shall in all cases be observed by the Corporation Commission in granting the license certificates to applicants for operation over said roads.

(f) No license certificates shall be issued for the operation on any highway in the State of any motor-propelled vehicles of greater width than eighty-six (86) inches and greater loaded weight than fifteen thousand (15,000) pounds for passenger traffic, and greater width than eighty-six (86) inches and greater loaded weight than nine (9) tons for freight traffic, and the said commission shall have power at any time, when in its judgment the public safety requires, to reduce the size and weight of motor-propelled vehicles operated upon the public highways of the State, whether hard surfaced or of other types of construction. And the said commission is further authorized to suspend temporarily, when the condition of the public highway requires it, the operation of motor-propelled vehicles either

for passenger or freight transportation along and over any public highway of the State, and notice of such suspension shall be given to every holder of a license certificate for operation over the said highway and to the public by publication in some newspaper or newspapers in general circulation in the territory of the route. The stipulations of this article as to width of any motor-propelled vehicle shall not apply to those motor-propelled vehicles in operation on or before January first, one thousand nine hundred and twenty-five, and which are not of greater width than ninety-four inches. [*Provided*, that no such vehicle of a greater width than eighty-six inches shall be permitted to be operated after twelve months from March 6, 1925.]

(g) The commission shall, at the time of granting a license certificate, fix and determine the amount of the bond to be given by the applicant for the protection, in case of passenger vehicles, of the passengers and baggage which is checked, carried, and of the public, against injury caused by negligence of the person or corporation operating the said vehicle, and in the case of vehicles transporting freight, for the protection of the said freight so carried and of the public against injuries received through the negligence of the person or corporation operating said freight-carrying vehicle; and it shall be the duty of the applicant to procure and file with the Secretary of State the said bond for liability and property damage, including loss of baggage, when same has been checked in accordance with rules prescribed by the commission, in the amount so fixed by the commission, giving the said bond or bonds in a surety company authorized to do business in the State of North Carolina, or depositing in lieu of said surety bond, bonds of the United States Government or the State of North Carolina or of any city or county in said State approved by the said Secretary of State. The said bonds shall be conditioned to indemnify passengers and the public receiving personal injuries by any act of negligence, and for damages to property of any person other than the assured; and such bond shall contain such conditions, provisions and limitations as the commission may prescribe, and said bond shall be payable to the State of North Carolina and shall be for the benefit of and subject to action thereon by any person or persons who shall have sustained an actionable injury protected thereby, notwithstanding any provision in said bond to the contrary, and every bond or insurance policy given shall be conclusively presumed to have been given according to and to contain all of the provisions of this article. And no license certificate shall be valid until such bond has been filed and approved and no such bond so accepted shall be canceled by the company issuing the same except upon ten days notice to the Secretary of State; and upon such notice being given by the county issuing said bond or bonds, the license certificate of the person or corporation giving such bond shall be revoked unless a new bond shall be filed and accepted before the date for the cancellation of the said bond: *Provided, however*, that the applicant may, in the discretion of the commission, be allowed to file in lieu of bond an insurance policy, which shall be approved by



the Secretary of State, with some casualty company or insurance company authorized to do business in the State of North Carolina. (1925, c. 50, s. 3, c. 137.)

### **§ 2613 (m). Power of Corporation Commission.**

The Corporation Commission of the State of North Carolina is hereby vested with power and authority to supervise and regulate every motor vehicle carrier in the State, to fix or approve the rates, fares, charges, classifications, rules and regulations of each such motor vehicle carrier; to fix and prescribe the speed limit, which may be less, but shall not be greater than that prescribed by the statute law of the State; to regulate the accounts, service and safety of operation of each such motor vehicle carrier; to require the filing of annual and other reports and of other data by such motor vehicle carriers, and to supervise and regulate motor vehicle carriers in all other matters affecting the relationship between such carriers and the traveling and shipping public. The Corporation Commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations applicable to any and all motor vehicle carriers, and the said commission is authorized, directed and empowered, whenever the public convenience and necessity requires, to increase or decrease the service upon any route for which the license certificate has been issued to any motor vehicle and to prescribe by rules when any motor vehicle carrier operating on a particular route may for a specific time increase the service on said route, and the Secretary of State through the automobile department is hereby authorized, empowered and directed to see that the rules and regulations prescribed by the Corporation Commission for the operation of motor-propelled vehicles on the highways of the State, and all and singular the provisions of this article, and of all statutes heretofore enacted regulating the traffic upon the highways of the State and fixing the speed limit for operation, are enforced; and also, said Secretary of State, through the automobile department is authorized and directed to collect all fees and charges imposed by this article upon such motor vehicle carriers, and to collect all fines and penalties imposed for violation of this article or for the violation of the rules and regulations prescribed by the Corporation Commission. (1925, c. 50, s. 4.)

### **§ 2613 (n). Revocation of license.**

The commission may at any time, upon written complaint made to it by the Secretary of State or by any citizen, or upon its own motion, that any motor vehicle carrier is violating the provisions of this act or any of the rules or regulations prescribed by the commission, or is violating any of the laws of the State or any requirement of his license certificate, issue its order to the said motor vehicle carrier notifying it to appear before the commission at a fixed time and place, at which time and place the commission shall investigate the complaint made, and if it shall be satisfied after such hearing that

the said motor vehicle carrier holding a license certificate has willfully violated or refused to observe the laws of this State touching motor vehicle carriers or any of the terms of his certificate or any of the commission's orders, rules or regulations, the said commission may suspend, revoke, alter or amend any certificate under the provisions of this article, but the holder of such certificate shall have the right of appeal to the Superior Court as is now provided by law for appeals from the orders of said commission: *Provided*, that in all cases of appeal from the decision of the commission, the commission may permit the certificate holder to operate pending such appeal if in the judgment of the commission the public convenience and necessity requires such service, but no certificate holder may operate pending such appeal unless permitted to do so by the commission. (1925, c. 50, s. 5.)

### § 2613 (o). Driver's permit.

No certificate holder under this article shall operate or permit any person to operate a motor vehicle for the transportation of persons or property for compensation in this State unless and until the operator thereof shall have obtained from the Secretary of State a driver's permit, which may be revoked for cause by the Secretary of State: *Provided, however*, that no such permit shall be issued to any person under eighteen years of age. Such permit shall always be carried by the person to whom issued, and shall be shown to any official or citizen upon request.

Each applicant for a driver's permit under the provisions of this article shall be examined by a person designated by the Secretary of State as to his knowledge of the traffic laws of this State and as to his experience as a driver, and such applicant may be required to demonstrate his skill and ability to safely handle his vehicle; he shall be of good moral character, and he shall furnish such information concerning himself as required, upon form provided for such purpose. If the result of such examination be unsatisfactory, the permit shall be refused. The Secretary of State shall collect a fee of one dollar for each permit issued by him, and all funds so collected shall be paid into the State treasury monthly to the credit of the State highway fund. (1925, c. 50, s. 6.)

### § 2613 (p). License plate; apportionment of tax.

It shall be the duty of the Secretary of State, upon the presentation of a certificate from the commission authorizing the motor vehicle carrier to operate, to countersign the same, upon payment of the proper license tax herein prescribed and the giving of the bond hereinbefore prescribed, to furnish the motor vehicle carrier with a distinguishing plate or marker of a design selected by the Secretary of State: *Provided, however*, that where it appears that the applicant has previously secured his several licenses for the year ending June thirtieth, one thousand nine hundred and twenty-five—then, in that event, the Secretary of State shall credit such applicant propor-



tionately with the unused portion thereof in computing the amount of the privilege or license tax required hereunder for the year for which said license certificate is granted. (1925, c. 50, s. 7.)

**§ 2613 (q). Amount of tax; interstate bus lines.**

There shall be collected by the Secretary of State, through the automobile department, a privilege, franchise or license tax from each grantee of a license certificate of six per cent of the gross amount received by said carrier from all fares and charges collected by it for the transportation of persons, property and freight, either or both, which said privilege tax shall be paid quarterly in advance; and at the time of issuing said license certificate the said Secretary of State shall collect from each grantee for the first quarter at least two hundred dollars, which said amount shall at the end of the quarter be credited to the said licensee, and if there is an excess, the same shall be paid to said licensee. In order to ascertain the gross amount of revenues received and collected by said licensee, the Secretary of State shall prescribe the books and forms of account to be kept by said licensee, and at the end of each current month the said licensee shall file with the Secretary of State a statement verified by an officer, if the licensee is a corporation, or if the licensee is a person, then by such person, showing the gross amount of fares and charges collected by said licensee during the said month. The books and records of the licensee shall be at all times open to the inspection of the said Secretary of State or any agent by him appointed for such purpose, and if the said licensee shall fail to make the monthly reports herein prescribed to the Secretary of State or shall fail to keep said books and records as prescribed by the said Secretary of State, then, upon notice in writing to said licensee of such default or defaults and the failure of the said licensee within five days to make said statement or to keep said records properly, the certificate issued to said licensee shall be revoked by the Corporation Commission upon notice by the Secretary of State, but the commission shall, if requested by the said licensee, order a hearing. The Secretary of State shall in his automobile department keep a true and accurate list of all persons and corporations to whom license certificates shall be issued, with the postoffice address of the licensee.

In the event that any motor vehicle carrier of persons or freight for compensation shall operate between a certain point or points without the State of North Carolina to a certain point or points within the State of North Carolina, then such motor vehicle carrier shall be subject to the same rules and regulations and the same privilege or license tax as motor vehicle carriers operating solely and entirely within the State, but in computing the license or privilege tax to be paid by such motor vehicle carriers, operating partly within and partly without the State, the privilege or license tax of six per cent upon the gross amount of fares and charges collected shall be based upon the proportion of mileage in the State as compared to the total mileage between the termini of the route of the said motor ve-

hicle carriers. And if such motor vehicle carrier operating on the route which lies partly without and partly within the State shall fail to pay the said license or privilege tax, then the Secretary of State is authorized and directed to compute said tax as best he can, to certify the same to the sheriff of any county in this State in which said motor vehicle carrier is operating, which said certificate to the said sheriff shall have all the force and effect of a judgment and execution, and the said sheriff is authorized and directed to levy upon any property in said county owned by said motor vehicle carrier, and to sell the same for payment of said tax as other property is sold in the State for the nonpayment of taxes, and for such service the sheriff shall be allowed the fees now provided by law for sales under execution. (1925, c. 50, s. 8.)

**§ 2613 (r). Disposition of proceeds.**

All funds collected under the provisions of this article shall be when collected paid to the State Treasurer and shall be credited by the State Treasurer to the general fund of the State and used as are other general funds of the State. (1925, c. 231, s. 1.)

**Editor's Note.**—Although chapter 231 of the acts of 1925 does not expressly repeal any section of chapter 50, it appears to be in conflict with § 9 of that act which is therefore inserted as § 2613 (r) 1.

**§ 2613 (r) 1. Distribution of proceeds of tax.**

It shall be the duty of the Secretary of State to keep a separate account of all moneys collected under this article, and any and all moneys so collected shall be paid to the State Treasurer monthly, and the amount so collected and paid to the State Treasurer shall be distributed as follows after deducting the necessary expenses incurred by the Secretary of State in the enforcement of the provisions of this article: To each county, whose county highway system is used as a part of the route authorized in the license certificate issued to any motor vehicle carrier, its part, computed upon the proportionate mileage of said county highway is to the entire mileage of the route of said license certificate holder; to each town or city, which out of its own revenue maintains its own streets, its proportionate part computed upon the mileage of said streets so used by the licensee in its route has to the entire mileage of said route, which such amounts shall be semiannually remitted to the said respective counties, cities, and towns by the treasurer of the State, said payments to be made on warrants of the State Auditor to the respective treasurers of the counties, cities, or towns, the balance of said fund to be placed to the credit of the highway fund of the State. (1925, c. 50, s. 9.)

**§ 2613 (s). Clerical assistance; compensation.**

The commission and the Secretary of State shall have authority to employ such clerks and other aid as may be necessary for their respective departments to carry out the provisions of this article, and



to fix their compensation subject to the approval of the Governor and Council of State, and said expenses and compensation of additional clerks or other aid shall be paid out of the moneys collected under this article. (1925, c. 50, s. 10.)

#### **§ 2613 (t). Penalties.**

Every officer, agent or employee of any corporation and every other person who willfully violates or fails to comply with or who procures, aids or abets the violation of any provision of this article, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction or requirement of the commission or any part or provision thereof, or who operates any motor vehicle for the transportation of persons or property for compensation while under the influence of intoxicating liquors or drugs, or in such a reckless manner or at such rate of speed as would endanger the safety of passengers or any other person along such highway, shall be guilty of a misdemeanor and punishable by fine of not less than fifty dollars nor more than five hundred dollars, or imprisonment, in the discretion of the court, or both fine and imprisonment in the discretion of the court. (1925, c. 50, s. 11.)

#### **§ 2613 (u). Photograph and name of driver and schedule to be posted.**

There shall be posted and kept posted therein on the inside of the front of each motor vehicle operated by any carrier the photograph and name of the driver and the schedule of time and fares. (1925, c. 50, s. 12.)

#### **§ 2613 (v). County and municipal taxes prohibited.**

No county, city or town shall impose any tax upon any motor vehicle carrier licensed under the provisions of this article, except *ad valorem* tax upon the property of the said motor vehicle carrier at the principal office of the said carrier along said route over which he operates. (1925, c. 50, s. 13.)

#### **§ 2613 (w). Constitutionality.**

If any section, subsection, sentence, clause or phrase of this article is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this article. (1925, c. 50, s. 14.)

#### **§ 2613 (x). Repeal of inconsistent acts.**

All acts or parts of acts inconsistent herewith are hereby repealed to the extent of said inconsistency, but nothing herein contained shall be construed to relieve any motor vehicle carrier as herein defined from any regulation otherwise imposed by law or lawful authority. (1925, c. 50, s. 15.)

**§ 2613 (z). Appropriation.**

A sum not exceeding ten thousand dollars (\$10,000) per annum is hereby appropriated to cover necessary expenses of the Corporation Commission in administering and enforcing the provisions of this article. (1925, c. 316.)

**ART. 4. OPERATION OF VEHICLES****§ 2615. Brakes, horns, and lights required.**

**When Negligence Precludes Recovery.**—Negligence in not having a light on the rear of a truck, as required by this section, will not preclude recovery against one who drove his car into the truck, unless it contributed to the injury. *Hughes v. Luther* (N. C.), 128 S. E. 145.

**§ 2616. Driving regulations; frightened animals; crossings.**

The violation of this section is negligence per se. *Davis v. Pony*, 189 N. C. 129, 126 S. E. 321.

**Ordinance Conflicting with This Section—Crossing Street.**—Under § 2601 an ordinance requiring drivers to stop before crossing a street in the residential section of a town is void as being in conflict with this section. *State v. Stallings*, 189 N. C. 104, 126 S. E. 187.

**Recklessness Not Cured by Subsequent Care.**—Where one driving an automobile in a reckless manner and in violation of the requirements of this section as to speed and care intended to prevent injury runs upon and kills a three-year-old child crossing a street in a populous portion of a city, he is guilty of manslaughter at least, and under some circumstances, murder, though as soon as he has seen the danger of the pedestrian he has used every effort to avoid injuring him, if his prior recklessness had rendered him unable to control the car and prevent the injury. *State v. Gray*, 180 N. C. 697, 104 S. E. 647.

**Same—Evidence of Negligence.**—Evidence tending to show that one of the defendants was instructing the other how to drive an auto truck, with the hands of both on the steering wheel, on a street much used by pedestrians in a populous part of the city, and while running at a speed exceeding the speed law and without looking ahead or warning, they ran upon, injured, and killed a child three years of age, endeavoring to cross the street, which a slight deflection of the machine from its course could have saved, is sufficient to sustain a verdict of manslaughter, irrespective of whether the death of the child was willfully or intentionally caused. *State v. Gray*, 180 N. C. 697, 104 S. E. 647.

**Charging Statutory Obligation under This Section.**—An instruction in an action to recover damages for the alleged negligence of the defendant in running upon and killing the plaintiff's intestate while a pedestrian upon the highway that fails to charge specifically as to the speed, the lookout, the signal, or control of the machine, or the other requirements of the driver of the automobile prescribed by this and the following section, and arising from the evidence in the case, is not cured by a general charge upon the rule of the prudent man, as to speed, or lookout, or the management of the car; and the omissions to charge specifically upon the statutory obligations is reversible error, without the tender of a prayer for more specific instructions by the plaintiff. *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170.

**§ 2617. Rule of the road in passing.**

Whenever a person operating a motor vehicle shall meet on the public highway any other person riding or driving a horse or horses



or other draft animals, or any other vehicle, the person so operating such motor vehicle and the person so riding or driving a horse, horses, or other draft animals, shall reasonably turn the same to the right of the center of such highway so as to pass without interference. Any person so operating a motor vehicle shall, on overtaking any such horse, draft animal, or other vehicle, pass on the left side thereof, and the rider or driver of such horse, draft animal, or other vehicle shall, as soon as practicable, turn to the right so as to allow free passage on the left. Any person so operating a motor vehicle shall, at the intersection of a public highway, keep to the right of the intersection of the center of such highway when turning to the right and pass to the right of such intersection when turning to the left, and shall signal with the outstretched hand the direction in which turn is to be made. [a. All operators of motor vehicles on the public roads, in meeting a motor vehicle in operation, shall pass on the right of the road in such a manner that all of said vehicles, and the load thereof, shall be on the right of the center of the road. b. All operators of motor vehicles on the public roads shall permit all motor vehicles approaching from the rear to proceed, either by turning to the right so that every part of the said vehicle and load thereof shall be on the right of the center of the road, or by proceeding at a rate of speed not in excess of the legal limit, as will allow said following vehicle to proceed without hindrance or obstruction. c. Any person violating any provision of subsections a and b shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars (\$50) or imprisoned not exceeding thirty days]. (1917, c. 140, s. 6; 1924, c. 61.)

**Violation Resulting in Accident.**—Our statutes on the subject of regulating the care to be used by those driving motor vehicles upon the State's highways, among them, this section, as to the passing without interference; 2618, amended by Public Laws 1921, ch. 98, Extra Session, as to reckless driving, having regard to the width of the highway, traffic thereon, and the various rates of speed in accordance with location in the country, upon streets of cities, towns, etc.; 2599, making a violation of any of the provisions of ch. 55, C. S., a misdemeanor, are to secure the reasonable safety of persons in and upon the highways of the State, and where death or great bodily harm results, evidence that the accused was, at the time charged, violating these provisions may be properly received upon a trial for murder or for manslaughter in appropriate instances, or as evidence of an assault where no serious injury has resulted. *State v. Sudderth*, 184 N. S. 753, 114 S. E. 828.

**Same—Assault and Battery.**—A battery includes an assault, and to constitute an assault it is not necessary that the defendant should have directly struck the one assaulted, for any unlawful touching of the person alleged to have been assaulted, or the setting in motion of any force that is committed through means which ultimately produce this result, and are likely to produce it, is sufficient and applies when a person driving an automobile upon the State's highway, in consequence of his violating the statutes on the subject, collides with another person driving an automobile thereon, which results in a physical jarring of such other person, though he may not have been thrown from his automobile, or struck in any part of his body. *State v. Sudderth*, 184 N. C. 753, 114 S. E. 828.

**Admissibility of Evidence as Part of "Res Gestæ."**—Where there is evidence that the defendant by his criminal recklessness in driving his

automobile on a public highway, prohibited by statute, collided with that in which the deceased was riding, causing his death, testimony as to the intoxicated condition of other men in the automobile with him at the time, together with the fact that some of them had whiskey, and the defendant's effort to borrow money to enable his brother to buy whiskey, with direct evidence of the defendant's intoxicated condition, is competent as a part of the *res gestæ* to show the defendant's opportunity to obtain whiskey at the time, and the purpose to have it on this occasion. *State v. Jessup*, 183 N. C. 771, 111 S. E. 523.

Where relevant as a part of the *res gestæ* upon the trial for manslaughter, for the criminally reckless driving of an automobile on a public highway, the impression of a witness from his own observation of the conduct and appearance of the defendant at the time, that the defendant was then under the influence of whiskey, is competent. *State v. Jessup*, 183 N. C. 771, 111 S. E. 523.

**Sufficiency of Evidence.**—Upon a trial for manslaughter alleged to have been caused by the defendant's criminally and recklessly driving an automobile upon a public highway under circumstances prohibited by statute, there was evidence tending to show that the deceased, being driven by his son in another automobile, on the proper side of an improved road, twenty-two feet wide, was rounding a curve near an embankment on the outside of the road, when the prisoner and others, in an intoxicated condition, going in the opposite direction, with unobstructed view, ran across from inside of the road where he should have remained, and with fifteen feet to spare, collided with the automobile in which the deceased was riding, causing his death: Held sufficient to sustain a verdict of conviction. *State v. Rountree*, 181 N. C. 535, 106 S. E. 676, cited and applied. *State v. Jessup*, 183 N. C. 771, 111 S. E. 523.

### § 2618. Speed regulations; mufflers.

No person shall operate a motor vehicle upon the public highways of this state recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limb of any person: *Provided*, [That no person shall operate a motor vehicle on any public highway, road or street of this State at a rate of speed in excess of:

(A) Twenty miles per hour in the built-up residential section of any village, town or city: *Provided*, that on any highway, road or street entering any city, town or village the built-up residential section shall be construed to begin at the first point, between which point and a point one thousand feet away on said street, road or highway there are as many as eight residences.

(B) Twelve miles per hour in the business portion of any town, or city.

(C) Fifteen miles per hour while passing any church or school when people are leaving or entering.

(D) Fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view upon all of the highways entering such



intersection for a distance of two hundred feet from such intersection.

(E) Fifteen miles per hour in traversing or going around corners of a highway or at apex or verticle curves when the driver's view is obstructed within a distance of three hundred feet along such highway in the direction of travel, and at places where the road is under repair or construction.

(F) Thirty-five miles per hour on all highways beyond the built-up residential section of incorporated cities or towns; except at points described in subsections C, D, and E of this section.

The governing body of every incorporated city or town shall have authority by ordinance to make reasonable street crossing regulations.

No person shall operate upon the public highways or streets a motor vehicle with muffler cut-out open, or with exhaust whistle or other objectionable signal devices. This section shall not be construed as repealing any Public-Local Law providing for a greater rate of speed than herein specified, or a different penalty for the violation thereof.] (1917, c. 140, s. 17; Ex. Sess. 1921, c. 98; 1925, c. 272.)

See note to § 4647.

**Section Includes Separate Independent Offenses.** — This section defining separately the reckless or careless driving of automobiles upon public highways, with reference to the streets in residential and business portions of incorporated cities and towns, and on the public highway outside of them, making a violation thereof a misdemeanor, states several offenses each of which is a separate crime, independent of the other. *State v. Mills*, 181 N. C. 530, 106 S. E. 679. See *State v. Rountree*, 181 N. C. 535, 106 S. E. 669.

Where a statute makes it a misdemeanor for careless or reckless driving of automobiles on public highways with regard to the width of the highway, or traffic thereon, and to the danger of life, limb, or property of persons thereon, and by proviso fixing varying speed limits for automobiles outside of and within incorporated cities or towns, making the violation of speed limits negligence per se, the legislative placing of these limits does not exclude a conviction for violating the preceding provisions of the statute at a less speed. *State v. Mills*, 181 N. C. 530, 106 S. E. 679.

**Violation by City Employee.**—This section, fixing a speed limit for motor vehicles, etc., and making its violation a misdemeanor, is a cumulative right of action given at common law for the recovery of damages for a personal injury caused by the negligent acts of another, and can confer no right of action to recover damages in such instances against a city, by reason of the violation of this statute by a driver of a motor cart or wagon in collecting garbage, etc., under an ordinance passed in pursuance of the provisions of C. S., 2799, the remedy, if any, being by indictment. *James v. City of Charlotte*, 183 N. C. 630, 112 S. E. 423.

**Sufficiency of Evidence.**—Where one is tried for the reckless driving of an automobile made criminal by this section and an unintentional killing has been established by him, evidence is sufficient for conviction of manslaughter which tends to show such recklessness or carelessness as is incompatible with a proper regard for human life or limb, or that such injury was likely to occur under the circumstances. *State v. Rountree*, 181 N. C. 535, 106 S. E. 669.

Evidence tending to show that the deceased was in a place of safety many feet beyond the well defined line of a public highway, and that

without any apparent reason the defendant ran his automobile therefrom a considerable distance, with a clear and unobstructed view, and without turning aside to avoid the impact ran over and killed the deceased, is sufficient to take the case to the jury upon the question of the defendant's culpable negligence, and sustain a verdict of guilty of manslaughter under the provisions of this section. *State v. Rountree*, 181 N. C. 535, 106 S. E. 669.

### **§ 2618 (a). Steel tired vehicles with cleats prohibited.**

It shall be unlawful for any person, firm or corporation to drive any motor vehicle upon the hard surface highways of the State, said motor vehicle having iron or steel tires with spikes or cleats in said tires, without first attaching some smooth surface on said tires so that the spikes or cleats will not damage said highway.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction fined not less than ten dollars or more than one hundred dollars, in the discretion of the court. (1925, c. 294, ss. 1, 2.)

### **§ 2618 (b). Duty of driver passing school bus.**

No person operating any motor vehicle on the public roads shall pass, or attempt to pass, any public school bus, while the same is standing on the said public road taking on or putting off school children, without first bringing said motor vehicle to a full stop at a distance of not less than fifty feet from said school bus.

Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. (1925, c. 265.)

### **§ 2618 (c). Speed of school bus.**

Any person operating a bus carrying school children to or from the schools in this State who shall travel at a greater rate of speed than twenty-five miles per hour along any public street or public highway in the State of North Carolina shall be guilty of a misdemeanor and shall be punished by a fine not in excess of the sum of fifty dollars. (1925, c. 297, s. 1.)

## **ART. 6. PROTECTION OF TITLE OF MOTOR VEHICLES**

### **§ 2621 (i). Definitions.**

The words and phrases used in this article shall be construed as follows, unless the context may otherwise require:

[ (a) The term "motor vehicles" shall include all vehicles propelled by power other than muscular power, except motorcycles operated by policemen or firemen when on official business, traction engines when not run on rubber tires, road rollers, fire wagons, fire engines, police patrol wagons, and also such vehicles that run only upon rails or tracks.]

(b) The term "state," except where otherwise expressly provided,



shall also include the territories and the federal districts of the United States.

(c) The term "owner" shall also include any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days. As between contract vendor and contract vendee, the term "owner" shall refer to the contract vendee unless the contrary shall clearly appear from the context of this article.

(d) The term "manufacturer" shall include a person, firm, corporation or association engaged in the manufacture of new motor vehicles, as a regular business.

(e) The term "used vehicles" covers a motor vehicle which has been sold, bargained, exchanged, given away or title transferred from the persons who first took out title to it from the manufacturer or importer, and so used as to have become what is commonly known as "second hand" within the ordinary meaning thereof.

(f) The term "dealer" shall embrace any person, firm or corporation or association engaged in the purchase and sale of motor vehicles, or in the leasing of the same for a period of thirty or more successive days. (1923, c. 236, s. 1; 1925, c. 124, s. 1.)

### **§ 2621 (j). Certificate of title for motor vehicles.**

After October first, nineteen hundred and twenty-three, no certificate of the registration of any vehicle or number plates therefor, whether original issues or duplicates, shall be issued or furnished by the secretary of state, or any other officer with such duty, unless the applicant therefor shall at the same time make application for an official certificate of title of such motor vehicle, or shall present satisfactory evidence that such a certificate covering such motor vehicle has been previously issued to the applicant. Said application shall be upon a blank form to be furnished by the secretary of state and shall contain a full description of the motor vehicle, which said description shall contain the manufacturer's number, the motor number, and any distinguishing marks, together with a statement of the applicant's title and of any liens or encumbrances upon said motor vehicle and such other information as the secretary of state may require.

The secretary of state, if satisfied that the applicant is the owner of such motor vehicle, or otherwise entitled to have the same registered in his name, shall thereupon issue to the applicant an appropriate certificate of title over his signature, authenticated by a seal to be procured and used for such purpose. Said certificates shall be numbered consecutively, beginning with number one, and shall contain such description and other evidence of identification of said motor vehicle as the secretary of state may deem proper, together with a statement of any liens or encumbrances which the application may show to be thereon. The charge for each original certificate of

title so issued shall be fifty cents, which charge shall be in addition to the charge for the registration of such motor vehicle. Said certificate shall be good for the life of the car so long as the same is owned or held by the original holder of such certificate, and need not be renewed annually, or at any other time except as herein provided. On or before September first, one thousand nine hundred and twenty-three, it shall be the duty of the secretary of state to cause to be printed copies of this article and to mail to every person to whom the secretary of state, or other officer having the duty of registration of motor vehicles has issued a certificate of registration for the year nineteen hundred twenty-three, one of such printed copies, accompanied by a blank form of application for a certificate of title. [The provision of this article shall apply to all dealers in motor vehicles as above defined upon receipt of such motor vehicles for sale in the State of North Carolina. They shall likewise apply to all motor vehicles owned and operated by municipalities or by the State or by any political subdivision thereof or by any State institution, subject, however, as to the latter class, to what is hereafter provided in this article. (1923, c. 236, s. 2; 1923, c. 124, s. 2.)

**§ 2621 (j) 1. Vehicles owned by state, state institutions and municipalities.**

All motor vehicles owned and operated by municipalities or by the State or by any political subdivision thereof or by any State institution shall have certificates of title issued for them to said governmental agency free of any cost to such government or agency thereof. (1925, c. 124, s. 3.)

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CHAPTER 56

**MUNICIPAL CORPORATIONS**

**Subchapter I. Regulations Independent of the Act of 1917**

**ART. 2. MUNICIPAL OFFICERS**

**§ 2642. Policemen execute criminal process.**

**Arrest of Intoxicated Driver of Automobile.**—A policeman of a city under this section, is given the same authority as is vested by law in sheriffs, and may arrest, without a warrant, a person in his presence violating section 4506 forbidding the operation of an automobile upon the streets by a person under the influence of intoxicating liquor. *State v. Loftin*, 186 N. C. 205, 119 S. E. 209.

**ART. 3. ELECTIONS REGULATED**

**§ 2650. When election held.**

In all cities and towns an election shall be held on Tuesday after the first Monday of May, one thousand nine hundred and five, and



biennially thereafter: Provided, that the provisions of this section shall not be construed so as to change, alter or amend any clause or provision in any charter of any town or city in Harnett county providing for an annual election of the officers of such town or city. [Provided further that the provisions of this section shall apply to the town of Dunn, in Harnett county.] (Rev., s. 2945; 1901, c. 750, s. 19; 1907, c. 165; 1925, c. 67.)

### § 2672. Notice of special election.

**Effect of Failure to Give Notice on Bonds Issued.** — Where the election for the issue of bonds by a township for road purposes has been held in all respects in accordance with the provisions of a statute, at the usual polling places, etc., they will not be declared invalid at the instance of a purchaser, on the ground that notice of the new registration ordered had not been advertised for the full twenty-day period stated in section 5926, amended by the Laws of 1913, or that the full period of the thirty-day notice of the time and place of the election had been advertised as set out in this section when there is no suggestion of fraud and full publicity had been given by newspapers of large local circulation, the election had been broadly discussed beforehand, and it does not appear that any voter is objecting to the bonds or has been deprived of his right to vote. *Board v. Molone*, 179 N. C. 10, 101 S. E. 500.

## ART. 4. ORDINANCES AND REGULATIONS

### § 2673. General power to make ordinances.

**Right to Erect Auditorium.**—City authorities, having funds already on hand, clearly have the right to erect an auditorium in the exercise of the powers conferred upon them, both by the general law and provisions of the charter applicable. *Adams v. Durham*, 189 N. C. 232, 126 S. E. 611, 612.

### § 2675. Repair streets and bridges.

**Liability for Negligence.**—Where a city, under the provisions of special and general statutes is authorized to open new streets, erect bridges therefor, etc., and required to keep them in proper repair, and permitted to pass laws for abating public or private nuisances of any kind, and preserving the health of its citizens, the authority is also conferred on them to properly construct the approaches of the streets to the bridges they may construct; and the city is liable in damages, as in case of maintaining a nuisance, for an injury to one driving an automobile across one of these bridges caused by the negligence of the city in leaving concrete pilasters extending into the road intended for the travel of vehicles. *Graham v. City of Charlotte*, 186 N. C. 649, 120 S. E. 466.

## ART. 8. PUBLIC LIBRARIES

### § 2702 (a). Detention of library property after notice.

Whoever willfully or maliciously fails to return any book, newspaper, magazine, pamphlet or manuscript belonging to any public library to such library for fifteen days after mailing or delivery in person of notice in writing from the librarian of such library, given after the expiration of the time, which by regulation of such library such book, newspaper, magazine, pamphlet or manuscript may be

kept, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than fifty dollars or imprisonment for not more than thirty days: *Provided*, that the notice required by this section shall bear upon its face a copy of this section. (1921, c. 118; 1925, c. 39, s. 1.)

**Editor's Note.**—By the amendment of 1925 the punishment for violation of this section, formerly in the discretion of the court, was limited to fifty dollars, or thirty days.

### § 2702 (b). Preceding section not retroactive.

The preceding section shall not affect the liability of any person to punishment who has before its enactment but since March fourth, one thousand nine hundred and twenty-one, offended against chapter one hundred and eighteen of the Public Laws of one thousand nine hundred and twenty-eight. (1925, c. 39, s. 2.)

## ART. 9. LOCAL IMPROVEMENTS

### § 2703. Explanation of terms.

See notes to section 2710.

### § 2704. Application and effect.

See notes to section 2710.

### § 2706. When petition required.

**Absence of the petition required by this section is a fatal defect**, and invalidates the assessment. However this defect may be cured by a validating act of the legislature even though the act is retrospective. *Holton v. Mocksville*, 189 N. C. 144, 126 S. E. 326.

### § 2707. What petition shall contain.

See notes to section 2710.

**Majority of Frontage.**—Under this section, it is necessary to the validity of the order for the improvement made by the governing body that the owners of abutting land shall have the majority of the frontage, as well as be the majority in number; and where the petition has not been signed for the city, and the city frontage is omitted, an order by the governing body to improve the street in conformity with the prayer of the petition is a nullity. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

**Effect of Failure of Majority to Petition.**—The failure of the signature of the owners of a majority of the lineal feet abutting on a street petitioned to be paved or improved, as required by this section, is a substantial and material departure from the essential requirements of the law under which the improvements are allowable, and will invalidate an assessment accordingly determined upon by the governing board of the municipality ordering the work to be done. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

**When Order Final.**—Where it appears to the court as a fact that a city has not signed the petition for street pavement and improvements submitted to its governing body through the municipal clerk, and that it was necessary for it to do so for the petitioners to own the required frontage on the abutting street to comply with the statute, the provisions of this section, that the action of the municipal body, upon the investigation and



report of the clerk, shall be final and conclusive, will not conclude the court from vacating the order of the city to improve the street according to the prayer of the petition; for otherwise it would subordinate the law, and the unlawful appropriation of property, to the action of the governing body of a municipality. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

### § 2708. What resolution shall contain.

**Discretion of Legislature.** — The necessity of proposed improvements upon the streets of a city and the apportionment of the assessments among the owners of lands abutting thereon, including street railways, are largely within the discretionary powers of the Legislature, and its subordinate agencies in charge and control thereof. *Durham v. Durham Pub. Service Co.*, 182 N. C. 333, 109 S. E. 40.

**Length of Cross Ties Included.**—This section, specifying that the burden imposed upon a street railway company in assessing its property for street improvements shall not exceed "the space between the tracks, the rail of the track, and eighteen inches in width outside of the tracks," is not violated if including the length of the cross ties, the statutory limitation of the width has not been exceeded. *Durham v. Durham Pub. Service Co.*, 182 N. C. 333, 109 S. E. 40.

### § 2710. Assessments levied.

**Subsection 1—Abutting Property.**—The power to impose assessments upon owners whose lands abut upon the streets of a city to be improved, comes within the sovereign right of taxation, and no license, permit, or franchise from the Legislature or a municipal board will be construed to establish an exemption from the proper exercise of this power by future Legislatures, or in derogation of it, unless these bodies are acting clearly within their authority, and the grant itself is in terms so clear and explicit as to be free from substantial doubt. As to whether such powers could be exercised so as to exclude future legislation, *Quaere?* *Durham v. Durham Pub. Service Co.*, 182 N. C. 333, 109 S. E. 40.

While local assessments against lands along the streets of a city for paving and improving the streets may be regarded as a species of tax, and the authority therefor is generally referred to the taxing power, they are not levied and collected as a contribution to the maintenance of the general government, but more particularly confer advantages or improvements on the lands assessed, and do not fall within the intent and meaning of the State Constitution, Art. V, sec. 5, or our statute, C. S., 7768, 7901; and the city, in assessing private owners, must take into consideration any city property that abuts on the street improved. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

In *Anderson v. Albemarle*, 182 N. C. 434, 436, 109 S. E. 262, it was said: "The words 'abutting on the improvement' mean abutting on the street that is improved, and that this does not require that the pavement shall extend the entire width of the street when this would be an unnecessary cost, and would greatly enhance the burden of which the plaintiff in this case complains. By the term 'abutting property' is meant that between which and the improvement there is no intervening land."

**Same—Public Park.** — In the absence of constitutional or statutory provision to the contrary, the public property of a municipality, such as parks, etc., is subject to assessment for local improvements of its streets, and when there is no provision exempting them, a public park of a city is included within the intent and meaning of Laws 1915, ch. 56, providing that lands abutting on a street to be paved or improved should be assessed for such improvements to the extent of the respective frontage of the lots thereon, in a certain proportionate part of the cost, by the "front foot" rule. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

**Same—Interference by Courts.**—Where an act allows assessments to

be made by a city on property abutting on a street for pavements or improvements thereon, the legislative declaration on the subject is conclusive as to the necessity and benefit of the proposed improvements, and in applying the principle and estimating the amount as against the owners, individual or corporate, the court may interfere only in case of palpable and gross abuse. *City of Kinston v. Atlantic, etc., R. Co.*, 183 N. C. 14, 110 S. E. 645.

**Subsection 2—Railroads.**—Where railroad property in a city lies along an unimproved street, but abuts upon an improved street that runs through the unimproved one, the owner is ordinarily liable to an assessment of one-half of the costs of the improvement on the abutting and improved street, and the exception in the statute as to street intersections is inapplicable. *Mount Olive v. Railroad*, 188 N. C. 332, 335, 124 S. E. 559.

In making an assessment on the property of a street railway company as an abutting owner on the street improved, not only the value of its tangible property, such as tracks, etc., should be considered, but, also the estimated value of the company's franchise under which it is operating, and which by fair apportionment should be included in these estimates. *Durham v. Durham Pub. Service Co.*, 782 N. C. 333, 109 S. E. 40.

A city ordinance granting a franchise to a street railway to operate upon its streets, requiring that it do certain grading and other things enumerated in its construction at its own expense, and further states in direct and continuous connection with this subject that "nothing herein contained shall be construed to require said company to pave its road," is held to apply only to conditions then existing, and will not be construed to exempt the corporation from paying its part of future assessments that may be levied upon abutting owners for the paving and improvements of the streets. *Durham v. Durham Pub. Service Co.*, 182 N. C. 333, 109 S. E. 40.

The property of railroad companies abutting upon the streets of a city is liable to assessments for the paving and improvements thereon to the same extent as that of private owners, in proper instances, and where proper legislative authority is therefor shown. *City of Kinston v. Atlantic, etc., R. Co.*, 183 N. C. 14, 110 S. E. 645.

Either directly or through its recognized governmental agencies, it is within the legislative authority to impose upon owners whose lands abut upon the streets of an incorporated city or town, an assessment for the change of grade of such street, grading them and like improvements, and the property and franchise of street railways laid along a given street or designated locality within the effects and benefits of the proposed improvements, may lawfully be brought within this principle as abutting owners. *Durham v. Durham Pub. Service Co.*, 182 N. C. 333, 109 S. E. 40.

The general statutes authorizing cities and towns to issue bonds and assess abutting lands for improving and paving streets, and not requiring that the questions be submitted to the voters, are additional and independent of special or local laws, and where the latter require the question to be first submitted to the voters for their approval, and these requirements have been fully met, under the private act, the transactions thereunder complete and their validity unquestioned, a railroad company may not resist an assessment made under the general law, this section, upon the ground that the provisions of the private acts, requiring the approval of the voters, control the question of the validity of the assessments. *City of Kinston v. Atlantic, etc., R. Co.*, 183 N. C. 14, 110 S. E. 645.

Where a city or town has proceeded under private acts to issue bonds and assess the lands of abutting owners for street paving and improvements and for insufficiency of funds thus expended find it necessary to assess the lands of a railroad company abutting on streets so improved, this section, a later act ratifying the private acts, evidently for the pur-



pose of curing apprehended defects and to make the bonds a more safe and desirable investment, cannot affect the validity of the proceedings under the general laws. *City of Kinston v. Atlantic, etc., R. Co.*, 183 N. C. 14, 110 S. E. 745.

### § 2711. Amount of assessments ascertained.

**Maps.**—A map, containing all the information required by this section, is a substantial compliance with its requirements. *Holton v. Mocksville*, 189 N. C. 144, 126 S. E. 326, 328.

### § 2713. Hearing and confirmation; assessment lien.

See notes to section 2710.

**Assessment Lien on Property.**—It is within the authority of the Legislature to make assessments against the lands of a railroad company abutting on streets improved by a city a paramount lien on its franchise and property, not requiring that such lien be given in express terms if by correct interpretation the statute intends that it shall be conferred, and when so conferred, the lien will necessarily be construed as being superior to all others. *City of Kinston v. Atlantic, etc., R. Co.*, 183 N. C. 14, 110 S. E. 645.

The amount of an assessment on the owner of land lying along a street for street improvements is by statute, creating a lien superior to all other liens and encumbrances and continuing, until paid, against the title of successive owners thereof. *Merchants Bank, etc. v. Watson*, 187 N. C. 107, 121 S. E. 181.

**Subsequent Liens Not Alone Included.**—The provisions of this section, that assessments made against abutting lands on streets paved or improved, shall be "from the time of the assessment and confirmation thereof, a lien superior to any and all liens and encumbrances," does not exclusively refer to subsequent liens; and the reference to the date of confirmation is only to fix the time when the lien is conclusively established, and when so established it takes the precedence over all liens then existent or otherwise. *City of Kinston v. Atlantic, etc., R. Co.*, 183 N. C. 14, 110 S. E. 645.

### § 2714. Appeal to superior court.

**Due Process of Law.**—The right of appeal to the courts being provided in case of dissatisfaction by an owner of land abutting on a street assessed by the governing body of a municipality for street improvement, the objection that the owner's property is taken for a public use in contravention of the due process clause of the Constitution is untenable. *Leak v. Wadesboro*, 186 N. C. 683, 121 S. E. 12.

**No Injunction Where Remedy under This Section Exists.**—The owner of land abutting on a street the municipality proposes to improve has his remedy under this section, in objecting to the local assessment on his property because of the insufficiency of the petition, and he may not enjoin the issuance of bonds for this necessary expense on that ground when he has failed to pursue his statutory remedy. *Brown v. Hillsboro*, 185 N. C. 368, 370, 117 S. E. 41.

### § 2716. Payment of assessments in cash or by installments.

**Judgment for Installment.**—Where the abutting owner of land on the streets has refused to pay the assessments lawfully made on him for street improvements, a judgment allowing him to pay by installments may be entered. *Durham v. Durham Public Service Co.*, 182 N. C. 333, 109 S. E. 40.

**§ 2717. Payment of assessments enforced.**

As to enforcement of liens within statutory period, see notes to section 441.

The lien created by this section is superior to all other liens and encumbrances, and may be enforced by decree of sale. *Kinston v. Atlantic, etc., R. Co.*, 183 N. C. 14, 110 S. E. 645.

**ART. 11. REGULATION OF BUILDINGS****§ 2763. Electric wiring of houses.**

**Degree of Care Required.**—There is nothing by which the user of an electrical appliance can detect the presence of an unusual high voltage or deadliness of current before touching the wire or coming in contact with it, and the greatest degree of care is required of those furnishing this deadly instrumentality to guard against the danger of its ordinary use as the circumstances may require. *McAllister v. Pryor*, 187 N. C. 832, 123 S. E. 92.

**Negligence Question for Jury.**—Where the furnisher of electricity for a building was, under its contract with the owner, required to furnish a low voltage of electricity for lighting and various domestic uses, and there is evidence tending to show that in attempting to iron clothes within the building with an electric iron the plaintiff touched the ironer and received a severe shock of electricity, to her injury, which should not and would not ordinarily have occurred by such use had the defendant supplied the current it had contracted to do, the doctrine of *res ipsa loquitur* applies, and the issue of actionable negligence should be submitted to the jury, denying defendant's motion as of nonsuit thereon. *McAllister v. Pryor*, 187 N. C. 832, 123 S. E. 92.

**Subchapter II. Municipal Corporation Act of 1917****ART. 15. POWERS OF MUNICIPAL CORPORATIONS****§ 2786. Powers applicable to all cities and towns.**

See notes to section 2787.

**§ 2787. Corporate powers.**

In addition to and coordinate with the power granted to cities in subchapter I of this chapter, and any acts affecting such cities, all cities shall have the following powers:

11. To open new streets, change, widen, extend, and close any street [or alley] that is now or may hereafter be opened, [to purchase any land that may be necessary for the closing of such street or alley] and adopt such ordinances for the regulation and use of the streets, squares, and parks, and other public property belonging to the city, as it may deem best for the public welfare of the citizens of the city. (1917, c. 136, sub. ch. 5, s. 1; 1919, cc. 136, 237; Ex. Sess. 1921, c. 21; 1923, c. 102; 1925, c. 200.)

**Editor's Note.**—Subsection 11, printed above, was the only part of this section affected by the amendment of 1925. It was not deemed necessary to include the other subsections as they are entirely separable.

**Sale of Coca-Cola on Sunday.**—An ordinance regulating the sale of merchandise, drinks, etc., on Sunday is a valid exercise of the police powers of an incorporated city or town; and while the service of meals



within the town at restaurants, etc., is a necessity, permitting the sale of coffee, tea, etc., the sale of coca-cola as a part of the meals is not included, and a sale thereof as a part of the meal may be prohibited by ordinance. *State v. Weddington*, 188 N. C. 643, 125 S. E. 257.

**Keeping of Cows within City.**—Under sub-sections 6, 7, and 10 of this section and the charter of the city of Charlotte an ordinance forbidding the keeping of cows within a certain portion of the city is valid. *State v. Stowe* (N. C.), 128 S. E. 481.

**Dance Halls.**—Cities have power, among other things, to license, prohibit, and regulate dance halls, by express provision of this section, and in the interest of public morals provide for the revocation of such licenses, as a valid exercise of the State's inherent police power, made applicable to cities and towns generally. *State v. Vanhook*, 182 N. C. 831, 109 S. E. 65.

An ordinance requiring the consent of the board of directors of the city before keeping a dance hall therein is not objectionable as an arbitrary exercise of power, or as being at the pleasure of the board, but comes within its limited legal discretion, which the courts will not permit it to abuse, or will disturb in the absence of its abusive use. *State v. Vanhook*, 182 N. C. 831, 109 S. E. 65.

**Public Parks.**—Under the provisions of our general statutes, a city or town is given authority to acquire and maintain parks for the use of its citizens beyond its corporate limits, and to provide suitable streets or ways of access thereto for the purpose. *Berry v. Durham*, 186 N. C. 748.

**Right to Erect Auditorium.**—City authorities, having funds already on hand, clearly have the right to erect an auditorium in the exercise of the powers conferred upon them, both by the general law and provisions of the charter applicable. *Adams v. Durham*, 189 N. C. 232, 126 S. E. 611, 612.

**Erection of Lumber Yards.**—Under the provisions of this section, and under the provisions of its charter authorizing a city to pass needful ordinances for its government not inconsistent with law to secure the health, quiet and safety within its limits, etc., it is within the valid discretionary exercise of the police powers of the municipality to pass an ordinance forbidding the erection of lumber yards within a long established, exclusively residential portion, and when this discretionary power has not been abused the courts will not interfere. *Turner v. New Bern*, 187 N. C. 541, 122 S. E. 469.

**Liability for Injuries in Connection with Incinerator.**—The building and maintaining of an incinerator is a governmental function, and a municipality will not be liable for injuries inflicted in the performance of such duty. *Scales v. Winston-Salem*, 189 N. C. 469, 127 S. E. 543.

## § 2791. Acquisition of property by purchase.

**Public Park.**—Under the provisions of our general statutes, a city or town is given authority to acquire and maintain parks for the use of its citizens beyond its corporate limits, and to provide suitable streets or ways of access thereto for the purpose. *Berry v. Durham*, 186 N. C. 421, 119 S. E. 748.

**When Acquisition for Public Use.**—The acquisition of land to be used to connect a railroad in which the State and counties own an interest with the city's public wharves and docks for water commerce, and necessary to continue or develop the industries of its citizens, is for a public use, and not subject to the exception that the city, in taking the right of way by condemnation from the owner, according to the provisions of its charter and the general statutes, were acting in violation of the Constitution in taking private property for a public use; and the private statutes specifically authorizing the proceedings is constitutional and valid. *Hartsfield v. New Bern*, 186 N. C. 136, 119 S. E. 15.

**Interference by Courts.**—The courts will not interfere with the statu-

tory discretionary powers given to the governing authorities of an incorporated town to take lands from adjoining owners in widening its streets for the public welfare, unless their action in doing so is so unreasonable as to amount to an oppressive and manifest abuse of the exercise of this discretion. *Lee v. Waynesville*, 184 N. C. 565, 115 S. E. 51.

**Same—Opposing Affidavits.**—Where it appears that the governing authorities of a town have taken plaintiff's adjoining lands to widen a street intersecting with other streets so as to lessen the danger to traffic thereon, and it is made to appear by affidavits and otherwise that doing so was a reasonable exercise of the discretion vested in them, the findings of the trial judge, upon opposing affidavits, that such course was unnecessary to a certain extent, and reducing the width of the land which should be appropriated for the purpose, is not binding on the Supreme Court on appeal, the question being, primarily, whether the administrative authorities of the town have so grossly and manifestly abused the exercise of their discretionary powers as to render their action ineffectual, which does not appear upon the facts of the instant case. *Lee v. Waynesville*, 184 N. C. 565, 115 S. E. 51.

**Improvements Made by Owner.**—The governing authorities of a town are not estopped to condemn land for the widening or improving of its streets by reason of an owner having put extensive improvements on his land a long time prior to the time it was condemned for that purpose, the power of condemnation, in cases of this character, being a continuing one to be exercised when and to the extent that the public good may require it. *Lee v. Waynesville*, 184 N. C. 565, 115 S. E. 51.

## § 2792. Requisition of property by condemnation.

See notes to §§ 1721 and 2791.

## § 2792 (b). Order for condemnation of land. Assessment districts. Maps and surveys. Hearing.

When it is proposed by any municipal corporation to condemn any land, rights, privileges or easements for the purpose of opening, extending, widening, altering or improving any street or alley, or changing or improving the channel of any branch or watercourse, for the purpose of improving the drainage conditions, or the laying and construction of sanitary, storm, or trunk sewer lines in such municipality, an order or resolution of the governing body of the municipality at a regular or special meeting shall be made stating generally, or as nearly as may be, the nature of the proposed improvement for which the land is required, and shall lay out, constitute and create an assessment district extending in every direction to the limits of the area or zone of damage or special benefits to property resulting from said improvement, in the best judgment of said governing body. Said governing body shall cause such maps and surveys to be made showing the area of such assessment district and improvements proposed to be made, and of all the lands located in said assessment district, as it may deem necessary. The governing body shall appoint a time and place for its final determination thereof, and cause notice of such time and a brief description of such proposed improvement to be published in some newspaper published in said municipality for not less than ten days prior to said meeting. At said time and place said governing body shall hear such reasons as shall be given for or against the making of such proposed improvement, and



it may adjourn such hearing to a subsequent time. [*Provided, however*, that no district shall be declared as an assessment district by the governing body of any municipality, where the purpose of the proposed improvements contemplates the opening of a new or the widening of an existing street and the destruction or removal of buildings abutting thereon and where as much or more than fifty per cent of the costs of such proposed improvement is to be charged against the property within such district, unless and until a petition therefor signed by at least a majority in number of the property owners, which must represent at least a majority of the street frontage to be assessed within said district, shall be filed with the governing body of such municipality.] (1923, c. 220, s. 2; 1924, c. 107; 1925, c. 107.)

### **§ 2793. Power to make, improve and control streets and sidewalks.**

**Streets to Public Park.**—The city of Durham has legislative authority under the provisions of the general statutes to acquire and maintain parks for the public use, outside of its corporate limits, and under this section to acquire and open up adequate and proper ways or streets thereto, and grade and improve the same. *Berry v. Durham*, 186 N. C. 421, 119 S. E. 748.

### **§ 2793 (a). Increasing width of streets.**

Any incorporated city or town in North Carolina where the State Highway Commission or governing body of any city, town or county has constructed a road or street, or any part of any road or street through such city or town in North Carolina, and the governing body of said city or town desires to increase the width of said road or street or either, or both sides of same, so as to make such road or street conform to such width as the said governing body of said city or town may determine, the governing body of such city or town may increase the width of such road or street, on either side of same, such number of feet as may be necessary and may be determined by the governing body of such city or town: *Provided, however*, that the expense and cost of such increase in width to such road or street shall be borne by the city or town through which such road or street may run and without any expense or obligation, in any way, to the State Highway Commission. (1925, c. 71, s. 1.)

### **§ 2793 (b). Right of eminent domain.**

Whenever the governing body of any city or town in North Carolina deems it necessary to extend the width of any road or street in such city or town, and it becomes necessary for such governing body of such city or town to exercise the right of eminent domain, such governing body of such city or town shall have the power to exercise the right of eminent domain to the extent that the same is given such city or town, or governing body of such city or town, in the charter and amendments to the charter of such city or town or under the general law pertaining to such matters. (1925, c. 71, s. 2.)

**§ 2793 (c). Interference with highway commission.**

Nothing in sections 2793 (a) and 2793 (b) shall authorize the governing body of any city or town to interfere with the rights and privileges of the State Highway Commission when such city or town undertakes to exercise any of the privileges by such sections. (1925, c. 71, s. 3.)

**§ 2793 (d). Whitakers excepted.**

Sections 2793 (a) to 2793 (c) shall not apply to the town of Whitakers. (1925, c. 71, s. 4.)

**§ 2799. Removal of garbage.**

**City Acting under This Section Not Liable for Damages.**—A city is in the exercise of a governmental duty in collecting garbage from the residence of its inhabitants under an ordinance passed in accordance with the provisions of this section, and is not liable in a civil action for damages to one injured by the negligence of its drivers of the carts or wagons when so engaged, there being no provision of law conferring such right. *James v. Charlotte*, 183 N. C. 630, 112 S. E. 423.

It is the primary duty of the owner or occupant of the premises to remove his garbage, etc., therefrom, under an ordinance passed in pursuance of this section; and upon his failure thereof, the city may remove the same under certain requirements of the owner or occupants, with its own carts or wagons; and the fact that the city is permitted to charge the cost of such service does not change its act from a governmental function to a business for profit, or affect its nonliability for the negligent acts of its agents or employees therein. *James v. Charlotte*, 183 N. C. 630, 112 S. E. 423.

C. S., 2618, fixing a speed limit for motor vehicles, etc., and making its violation a misdemeanor, is a cumulative right of action given at common law for the recovery of damages for a personal injury caused by the negligent acts of another, and can confer no right of action to recover damages in such instances against a city, a reason of the violation of this statute by a driver of a motor cart or wagon in collecting garbage, etc., under an ordinance passed in pursuance of the provisions of this section, the remedy, if any, being an indictment. *James v. Charlotte*, 183 N. C. 630, 112 S. E. 423.

**§ 2807. Establish and maintain water and light plants.**

**In General.**—The common-law principle upon which a city may not be held liable for its failure to supply sufficient water for extinguishing fires is now set at rest by this section which is valid. *Mack v. Charlotte City Water-Works*, 181 N. C. 383, 107 S. E. 244.

**Injuries Caused by Officials.**—A municipality may not be held liable at the suit of individuals for injuries caused by its officials when in the exercise of governmental functions and matters affecting only the public interests, unless such liability is expressly recognized and provided for by statute. *Mack v. Charlotte City Water-Works*, 181 N. C. 383, 107 S. E. 244.

**§ 2813. Provide for listing and collecting taxes.**

The governing body shall provide by an ordinance or otherwise means for the collection of taxes in the city and shall cause property to be listed for taxation which has not otherwise been listed as required by law. [The governing body of cities and towns are in all respects vested with the same powers and authority as is now, or may hereafter be, vested in the board of county commissioners of



the county in which such city or town is located, with respect to the allowance of discounts and charging penalties in the collection of taxes.] (1917, c. 136, sub-ch. 6, s. 2; 1925, c. 183.)

### § 2815. Lien of taxes.

**When Lien Attaches.**—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon (C. S., secs. 7986, 2815), subject to certain exemptions specified in Const., Art. V, secs. 3 and 5. *Carstarphen v. Plymouth*, 186 N. C. 90, 118 S. E. 905.

## ART. 16. EXERCISE OF POWERS BY GOVERNING BODY

### § 2825. How ordinances pleaded and proved.

**Negligence in Backing Train.**—The introduction of an ordinance of a town regulating the speed of trains backing upon the track, and properly proven under this section, and requiring a signal light to be displayed, will not be regarded as error on appeal, when it is proven that upon the evidence in the case the jury has found, upon a trial without legal error, the negligence of the defendant's employees proximately caused the personal injury for which damages were sought in the action. *Parker v. Seaboard Air Line Railway*, 181 N. C. 95, 106 S. E. 755.

### § 2831 (a). Separate specifications for contracts; responsible contractors.

Every officer, board, department, commission or commissions charged with the duty of preparing specifications or awarding or entering into contract for the erection, construction or alteration of buildings in any county or city, when the entire cost of such work shall exceed ten thousand dollars, must have prepared separate specifications for each of the following branches of work to be performed: 1. Heating and ventilating. 2. Plumbing and gas fitting. All such specifications must be so drawn as to permit separate and independent bidding upon each of the classes of work enumerated in the above subdivisions. All contracts hereafter awarded by any county, or city, or a department, board, commission, or commissioner, or officer thereof, for the erection, construction or alteration of buildings or any part thereof, shall award respective work specified in the above subdivisions separately to responsible persons, firms or corporations regularly engaged in their respective line of work. (1925, c. 141, s. 1.)

### § 2831 (b). Validating certain conveyances.

All deeds heretofore made, executed, and delivered, for a good and valuable consideration, by incorporated cities and towns conveying lands used for park purposes, without authority to make and deliver such deed having been first granted by the General Assembly, are hereby in all respects validated, ratified, and confirmed as fully and completely as if said cities and towns had been granted authority of the General Assembly to make and deliver said deeds, and said deeds are hereby declared to be valid conveyances of the land and premises therein described. (1924, c. 95.)

## Subchapter III. Municipal Finance Act

### ART. 23. GENERAL PROVISIONS

#### § 2918. Short title.

**Municipal Finance Act of 1921 Unconstitutional in Part.**—The Municipal Finance Act of 1921, with its repealing clause, being unconstitutional and invalid as to contracting debts and levying taxes, the laws now in force and effective on these subjects are Consolidated Statutes, Vol. I, secs. 2918 to 2967, inclusive; and under these laws, counties, cities, and towns and taxing districts are restricted from levying a tax rate that will realize an amount greater than 10 per cent in excess of the tax collected by them for the year 1919, and prohibited from further increasing their net municipal indebtedness by an amount greater than 10 per cent on the average assessed value of the property for the next preceding three years. *Allen v. Raleigh*, 181 N. C. 453, 107 S. E. 463.

### ART. 26. PERMANENT FINANCING

#### § 2937. For what purposes bonds may be issued.

**Editor's Note.**—For local acts applicable to the city of Asheville, see Acts 1925, cc. 22 and 139.

**Bonds Issued by Aldermen.**—The board of trustees of New Bern Academy, incorporated by 7 George III, and recognized by legislation in North Carolina by amendment from time to time, and given powers incident to boards of this character for issuing bonds, as well as plenary powers in the management of the school, found it necessary in stringent financial times to borrow money at various times from banks in order to keep the schools going. Upon the presentation of the matter to the board of aldermen of the city, an election was had upon the question of issuing bonds to take up the debt, in accordance with the Municipal Finance Act of 1921, and the proposition was approved: Held, the said board of trustees is an official board of said city, and its debts are the debts of the city, C. S., 2937; and the bonds issued by them to take up the indebtedness created before 5 December, 1921, and approved by the voters, are a valid obligation of the city, under the amendment of chapter 106, Extra Session of 1921, to C. S., 2937 (2), authorizing municipalities to fund or refund their indebtedness. See C. S., 2787, 2960 (2), 2937 (1). *Jones v. City of New Bern*, 184 N. C. 131, 113 S. E. 663.

#### § 2938. Ordinance for bond issue.

**Statement of Proportion of Cost Unnecessary.**—It is not required by the various statutes on the subject that a bond ordinance of a municipality set forth in express terms the proportion of the cost of the proposed improvements which has been, or is to be, assessed against the property of each owner abutting upon the streets to be improved or the terms and method of making the payment, if the procedure follow the direction of the statutes relating to the subject. *Leak v. Wadesboro*, 186 N. C. 683, 121 S. E. 12.

#### § 2940. Bonds may be divided into two classes and separate issues.

**Editor's Note.**—For local act applicable to the city of Asheville, see Acts 1925, c. 139.

#### § 2942. Determining period for bonds to run.

**Editor's Note.**—For local act applicable to the city of Asheville, see Acts 1925, c. 139.



## § 2943. Sworn statement of indebtedness.

**Editor's Note.**—For local acts applicable to the city of Asheville, see Acts 1925, cc. 22, 139.

**Special Assessments for Street Improvements Charged Off.**—Where a town has issued bonds for general street improvements under legislative authority, and includes the amount required for local improvements by assessment of owners of lands abutting a particular street improved, it may charge off from the proceeds of the sale of the bonds the estimated amount to be realized by the special assessments under the provisions of this section as amended in 1921. *Brown v. Hillsboro*, 185 N. C. 368, 370, 117 S. E. 41.

## § 2948. Elections on bond issue.

**Election on Issue of School Bonds.**—Where a school board of trustees has borrowed money, and an election is regularly called to vote upon the question as to taking up the debt by a bond issue, the approval of the voters at the election afterwards so held is a ratification of the previous act of the school board, under this section, and renders unimportant the question as to whether the money had been borrowed for necessary purposes. *Jones v. New Bern*, 184 N. C. 131, 113 S. E. 663.

Objection to the validity of the election, that the returns for and against an issue of school bonds had not been published as required by this section, may not be sustained, there being nothing in the act indicating that such publication was essential, it appearing that the books were kept open for the period required by law for registration, with full notice to the voters, and no prejudice sustained thereby. *Board v. Malone & Co.*, 179 N. C. 604, 103 S. E. 134.

**Same—Form of Ballot Directory Only.**—There being no exact language essential to the validity of a ballot upon which the question of a proposed school bond issue shall be submitted to the voters at a municipal election under a city ordinance, the form of sec. 22, ch. 178, Laws 1919, known as the "Municipal Finance Act," "for the ordinance" or "against the ordinance" is directory and not mandatory, and a ballot with the words "for school bonds" or "against school bonds" is a substantial compliance therewith, and this departure alone will not affect the validity of the bonds issued accordingly. *Board v. Malone & Co.*, 179 N. C. 604, 103 S. E. 134.

**Same—Publication of Ordinance.**—Where a municipal ordinance calling for an election to vote upon the question of the issuance of school bonds has been published but once in a newspaper of wide circulation among the voters, instead of once a week for four successive weeks, provided by the statute, the statute does not make the validity of the bonds to depend upon the longer or more extensive publication, and the failure of compliance therewith does not affect the validity of the bonds, when every qualified person has cast his vote thereon, and the issue sustained by a large majority of those voting, without challenge. *Board v. Malone & Co.*, 179 N. C. 604, 103 S. E. 134.

**Same—Manner of Publication.**—The validity of municipal school bonds is not affected by the fact that the ordinance required that the validity of the resolution could only be questioned by action, etc., within thirty days from its last publication, when the statute authorizing the ordinance requires that its validity could only be questioned within thirty days after its first publication, there being no statutory requirement making the manner of publication essential to the validity of the bonds, or mandatory, and it appears that the election called for was fairly held, giving the voters full opportunity, and it resulted in a large majority in favor of the bonds. *Board v. Malone & Co.*, 179 N. C. 604, 103 S. E. 134.

**§ 2952. Bonded debt payable in installments.**

**Editor's Note.**—For local act applicable to the city of Asheville, see Acts 1925, c. 139.

ART. 27. RESTRICTION UPON EXERCISE OF MUNICIPAL POWERS

**§ 2965. Outstanding floating debt, validated, and may be funded.**

**Editor's Note.**—For local act applicable to the city of Asheville, see Acts 1925, c. 22.

ART. 29. STATE SUPERVISION OF PAYMENT OF BONDS

**§§ 2969 (b)-2969 (i).**

Repealed by Acts of 1925, c. 100, s. 13. See sections 2969 (j) *et seq.*

**§ 2969 (j). Statement of outstanding obligations filed with auditor.**

On or before June first, one thousand nine hundred and twenty-five, it shall be the duty of the clerk or secretary or other recording officer of each board in the State of North Carolina which has heretofore authorized the issuance of county, township, school district, taxing district or municipal bonds or notes having a fixed maturity of one year or more from the date thereof, to file with the State Auditor a statement giving the amount of such bonds or notes then outstanding, their date, the time or times of maturity thereof and of the interest payable thereon, the rate of interest born, the place or places at which the principal and interest are payable, the denomination of the bonds or notes, and the purpose of issuance. The statement shall also contain the name of the board in which is vested the authority and power to levy the taxes for the payment of the principal and interest of said bonds or notes, and a reference to the law under which said bonds or notes are issued. The State Auditor shall record substance of such statement, and also the substance of similar statements recorded by the law repealed by this article, in a book or books to be provided for that purpose. (1925, c. 100, s. 2.)

**§ 2969 (k). Statement by governing board to auditor.**

It shall be the duty of the recording officer of the governing body or board which shall hereafter authorize any bonds of a county, township, school district, municipality or taxing district, having a fixed maturity of at least one year after the date thereof, to file with the State Auditor a statement giving the amount so authorized, their date, the time or times of maturity thereof, and of the interest payable thereon, the rate of interest to be borne, the place or places at which the principal and interest will be payable, the denomination thereof, and the purpose of issuance, and said statement shall also contain the name of the board in which is vested the authority and



power to levy the taxes for the payment of the principal and interest of such bonds, and a reference to the law under which such bonds are to be issued and no such bonds shall be valid until such statement shall have been filed. The State Auditor shall record the substance of such statement in a book or books to be provided for that purpose, and upon request of such recording officer shall issue his certificate to the effect that the statement required by this article has been filed and recorded, and such certificate shall be conclusive evidence of the fact of filing and recording in any action or dispute in relation to the validity of such bonds. (1925, c. 100, s. 3.)

**§ 2969 (1). Blank forms furnished by auditor.**

It shall be the duty of the State Auditor to prepare and furnish to all counties, townships, school districts, taxing districts and municipal corporations throughout the state blank forms upon which such statements may be made, and to keep the statements made pursuant to this law in proper file properly indexed. (1925, c. 100, s. 4.)

**§ 2969 (m). Certification of necessary taxes by state auditor.**

It shall be the further duty of the State Auditor to mail to the recording officer of each board having the power to levy taxes for the payment of the principal or interest of such obligations, as to which statements have been so filed, at least thirty days before the time for the levy of taxes in each year, a statement of the amount to be provided by taxation or otherwise for the payment of the interest accruing upon such bonds or notes within the following year and for the payment of the bonds then maturing. (1925, c. 100, s. 5.)

**§ 2969 (n). Statement of auditor to treasurer.**

It shall be the further duty of the State Auditor to mail to the treasurer or other disbursing officer of every county, township, school district, municipality and taxing district, as to which statements have been filed as provided by this article, at least thirty days before each date upon which any installment of principal or interest of such bonds or notes thereof become payable, a statement of the amount of such payment to be made and the place of payment and a reference to the obligation upon which such payment is required. (1925, c. 100, s. 6.)

**§ 2969 (o). Failure to provide for payment; forfeiture.**

If any board whose duty it shall be to provide for the payment by taxation, or otherwise, of the principal or interest of any such bonds or notes mentioned in sections two and three of this article shall willfully fail or refuse to make provision for such payment by the levy of such taxes as are authorized to be levied therefor, or otherwise, at or before the time provided for such tax levy, any member

thereof who shall be present at the time for such levy who shall not have voted in favor thereof, or who shall not have caused his request that such provision be made to be recorded in the minutes of the meeting, shall forfeit and pay to any taxpayer or any holder of such obligations or interest coupons who sues for the same the sum of two hundred (\$200.00) dollars for each such failure and also all damages caused thereby. (1925, c. 100, s. 7.)

**§ 2969 (p). Failure to pay; penalty.**

If any officer whose duty it shall be to pay any of such principal or interest or to remit funds for such payment to the promised place for the payment thereof shall fail or refuse so to do in sufficient time and in sufficient amount for such payment, and if funds for such payment shall be in the hands of such officer, whether or not such payment or remission for payment shall have been ordered or forbidden by any board or officer, the officer so failing or refusing shall be guilty of a misdemeanor and shall forfeit and pay to any taxpayer or any holder of such obligations or interest coupons who sues for the same the sum of two hundred (\$200.00) dollars for each such failure and also all damages caused thereby. (1925, c. 100, s. 8.)

**§ 2969 (q). Violation of article; voting for diversion of funds; penalty.**

Any member of any board who shall knowingly and willfully violate the provisions of this article by voting for any appropriation of money raised by taxation, or otherwise, for the payment of the interest and principal or sinking fund of any such bonds or notes to any other purpose until all of such principal and interest shall have been paid, and any disbursing officer who shall knowingly and willfully violate the provisions of this article by paying out any of such funds to any other purpose than the payment of such principal and interest until all of such interest and principal shall have been paid, whether or not such payment shall have been ordered or forbidden by any board, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. (1925, c. 100, s. 9.)

**§ 2969 (r). Failure to file statement; forfeiture.**

If any officer whose duty it shall be to file any statement required by section 2969(j) shall fail or refuse to file such statement by June the first, nineteen hundred and twenty-five, or if any officer whose duty it shall be to file any statement required by section 2969(k) shall fail or refuse to file such statement before the delivery of the bonds or notes concerning which such statement is required, the officer so failing or refusing shall be guilty of a misdemeanor and shall forfeit and pay to any taxpayer or any holder of such obligations or interest coupons who sues for the same the sum of two hundred



(\$200.00) dollars for each such failure and also all damages caused thereby. (1925, c. 100, s. 10.)

**§ 2969 (s). Auditor to mail statements of penalties and forfeitures.**

The statements which the State Auditor is herein required to mail under sections 2969(1) and 2969(m) shall be accompanied by statements of provisions of this article as to penalties and forfeits and misdemeanors for failure to comply with the duties referred to in such statements. (1925, c. 100, s. 11.)

**§ 2969 (t). Forfeiture by auditor for non-compliance.**

If the State Auditor shall fail to perform any duty imposed upon him by this article he shall forfeit and pay to any taxpayer or any holder of such obligations or interest coupons who sues for the same the sum of two hundred (\$200.00) dollars for each failure and also all damages caused thereby. (1925, c. 100, s. 12.)

**§ 2969 (u). Payment of fees to bank.**

Whenever any county, city, town, township, school district or school taxing district is or shall be authorized or permitted to make payments of bonds or coupons issued by it or in its behalf at any place other than within such county, city, town, township, school district or school taxing district, and such bonds or coupons are by their terms payable at such other place, it shall be lawful for the officer disbursing the funds for such payment to pay the reasonable fees of the bank, trust company or other agency making payment at such place, and to agree to pay such fees at a fixed rate throughout the term of the bonds as to which such payment is to be made at such place, but no fee in excess of one-fourth of one per cent of the amount of interest paid and one-eighth of one per cent of the amount of principal paid shall be deemed reasonable. (1925, c. 195, s. 2.)

**§ 2969 (v). Registration.**

Each county, city, town, school district and school taxing district which has issued or shall hereafter issue bonds in its own name, and each county, city and town, which has issued or shall hereafter issue bonds in behalf of a school district or school taxing district, is hereby authorized to keep in the office of its treasurer or financial agent or its clerk, or in the office of the bank or trust company appointed by its governing body as bond registrar, a register or registers for the registration as to principal of such bonds in the name of the owner thereof, in which it may register any such bond as to principal at the time of its issue, or at the request of the holder thereafter. Such registration shall not affect the payment of interest, but such interest shall continue to be made upon the presentation and surrender of interest coupons if issued, but after such registration as to principal, the principal shall be payable to the person

in whose name registered or to the person in whose name the bonds registered may be transferred on such register by the registered owner in person or by attorney, upon presentation to the bond registrar, accompanied by delivery of a written instrument of transfer in a form approved by the bond registrar, executed by the registered owner: *Provided, however*, that a registered bond may be discharged from registry by a transfer to bearer registered as herein provided. Upon the registration or transfer of a bond as aforesaid the bond registrar shall note such registration or transfer on the back of the bond. (1925, c. 129.)

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## CHAPTER 58

### NEGOTIABLE INSTRUMENTS

#### ART. 2. FORM AND INTERPRETATION

##### § 2982. Form of negotiable instrument.

**To Whom Payable.**—In order to come within the intent and meaning of our negotiable instrument law, a note, must be payable to the order of a specified person or to bearer. *Hunt v. Eure*, 188 N. C. 716, 125 S. E. 484.

**When Instrument Included.**—In *Trust Co. v. Leggett*, 185 N. C. 65, 67, 116 S. E. 1, the Court said: "The former portion of this instrument, containing as it does a positive provision to pay a specific sum of money at a designated time, comes well within the definitions of a negotiable promissory note as accepted by approved precedents and the express provision of our statute on the subject."

##### § 2983. What constitutes certainty as to sum.

**Counsel Fees When Note Payable in Another State.**—This section will prevent recovery on notes containing the objectionable stipulation as to counsel fees even when they were executed and payable in another state. *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629.

##### § 2997. Delivery necessary; when effectual; when presumed.

**Evidence of Legal Delivery.**—The legal delivery of a note does not alone depend upon giving it to the payee in person, but it may be evidenced by its delivery to another for the payee showing the maker's intent to part with control over it, and that it was for the payee's benefit in accordance with the terms of the instrument. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867.

##### § 2998. Construction, where instrument is ambiguous.

See note to § 3044.

#### ART. 3. CONSIDERATION

##### § 3004. Presumption of consideration.

See notes to section 3010.

**Applicable Only to Negotiable Instruments.**—The principle that when  
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a note sued on reciting a valuable consideration, has been shown to have been executed and delivered, makes a prima facie case in plaintiff's favor that he has paid value, requiring the defendant to disprove it by the preponderance of the evidence, applies only to negotiable instruments under the provisions of our statutes, and not to those which are nonnegotiable; and an instruction that places this burden on the defendant in the latter instance, is reversible error. *Hunt v. Eure*, 188 N. C. 716, 125 S. E. 484. See note of this case under § 3008.

**Burden of Proof.**—Where, between the original parties, the maker sets up the want of consideration for a note he has made to the payee, as a defense, in an action thereon, the burden is upon him to introduce evidence to establish his defense, and his failure to do so will entitle the payer to a judgment in his favor; and the maker's mere conclusion as to the fact constituting his defense is insufficient, when his testimony is itself insufficient to establish it. *Merchants Nat. Bank v. Andrews*, 179 N. C. 341, 102 S. E. 500.

Where the execution of a negotiable instrument has been established in an action thereon, it is a rebuttable presumption that it had been given for a sufficient consideration, and that the maker had mental capacity to execute it, requiring the defendant, attacking its validity on these grounds, to disprove its validity by his evidence. *Jones v. Winstead*, 186 N. C. 536, 120 S. E. 89. This case also considers at length the presumption of sanity in the maker of a negotiable note. Ed. Note.

**Sufficiency of Evidence to Rebut Presumption.**—The defendant was an endorser on a note given to a bank, of a corporation of which he was president, his corporation doing its business at the payee bank, and defendant at another bank, and relied as a defense in an action by the payee thereof to recover thereon, the want of consideration therefor. His evidence, and the only evidence in the case, tended to show, that he had given the payee bank two checks on his own bank for two amounts, at the request of the officer of the payee bank, one of which was for interest to discount an extension on his own personal paper, and the other, interest for like purpose, on the paper of his corporation, and that the payee bank did not pay him "on that day" the money on the note, or any one else at his request, it was held, insufficient to rebut the presumption raised by his endorsement on the note, that he received value therefor, and the court was not in error in directing verdict on the evidence should the jury find the facts accordingly. *Merchants Nat. Bank v. Andrews*, 179 N. C. 341, 102 S. E. 500.

### § 3005. What constitutes consideration.

See notes to § 3010.

### § 3008. Effect of want of consideration.

**Not Applicable to Nonnegotiable Paper.**—Whether the provisions of this section of the Consolidated Statutes should be extended to nonnegotiable bills and notes so as to make the rule uniform is a matter which is addressed to the exercise of the legislative discretion. *Hunt v. Eure*, 188 N. C. 716, 719, 125 S. E. 484. See note of this case under section 3004.

## ART. 4. NEGOTIATION

### § 3010. What constitutes negotiation.

**Delivery without Endorsement.**—Where the maker executes her promissory note to her own order and delivers it without endorsement, any person thereafter acquiring the instrument without endorsement takes it subject to the equities existing between the original parties, under §§ 3004, 3030; as this section requires that where the instrument is "payable

to order" it is negotiated by the endorsement. *Bank v. Yelverton*, 185 N. C. 315, 117 S. E. 299.

**Warehouse receipts** issued under § 4925 (1) endorsed by the owner of cotton and by the superintendent of a warehouse are negotiable by delivery, and when taken as collateral confer upon the holder the position of a bona fide holder for value. *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 26 S. E. 316.

### § 3030. Effect of transfer without endorsement.

**In General.**—Where the maker executes her promissory note to her own order and delivers it without endorsement, any person thereafter acquiring the instrument without endorsement takes it subject to the equities existing between the original parties, under C. S., 3004 and 3030; as section 3010 requires that where the instrument is "payable to order" it is negotiated by the endorsement. *Bank v. Yelverton*, 185 N. C. 314, 117 S. E. 299.

## ART. 5. RIGHTS OF HOLDER

### § 3033. What constitutes holder in due course.

See notes to sections 3037 and 3040.

**Effect of Renewal Note.**—A renewal note taken by a bank is not necessarily an extinguishment of the note it is given to renew, and nothing else appearing, the bank takes with notice of the infirmity, when it has purchased the original one after maturity and the maker may set up the infirmity existing between himself and the payee named therein, who has negotiated it to the bank. *Grace & Co. v. Strickland*, 188 N. C. 369, 124 S. E. 856.

**Security Follows Note.**—When a note secured by a mortgage is transferred to a bona fide holder, the security follows the note and the mortgagee holds the legal title in trust for the holder. *Citizens' Sav. Bank, etc. v. White*, 189 N. C. 281, 126 S. E. 745.

**Question for Jury.**—While a bank purchasing a negotiable instrument before maturity and for value, prima facie takes the paper free from any infirmity in the instrument, it may be shown to the contrary that there was an arrangement between the bank and its depositor that the former had acquired the paper under an arrangement to charge it back to its depositor in the event of nonpayment by the maker; and where the testimony is conflicting, an issue of fact is presented for the jury to determine as to whether the bank was a holder in due course or merely an agency for collection. *Manufacturers Finance Co. v. Amazon Cotton Mills Co.*, 187 N. C. 233, 121 S. E. 439.

### § 3036. When title defective.

As to burden of proof when title defective, see notes to section 3040.

### § 3037. What constitutes notice of defect.

**Actual Knowledge.**—"While there may have been observable irregularities on the face of an instrument, and on conditions presented, sufficient to put one on inquiry under the general statute on negotiable instruments, chapter 58, C. S., this will no longer suffice to affect the rights of a holder in due course, but there must have been either actual knowledge of the infirmity or knowledge of such facts as to constitute bad faith on the part of the taker." *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 126 S. E. 316, 320.

**Same—Notice Inducing Prudent Man to Inquire.**—The principle that holds an endorsee of a negotiable instrument subject to the equities existing between the original parties when the instrument is affected with fraud or infirmity is now fixed by section 3033 and this section, and it is



now required, however conflicting the former authorities may have been, that "the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith;" and it is reversible error for the judge to charge the jury, in effect, that he would be bound by the original equities if he had such notice as would induce a prudent man to inquire into the circumstances and discover the defect. *Holleman v. Trust Co.*, 185 N. C. 49, 115 S. E. 825.

**Sufficiency of Notice of Fraud.**—Evidence that an illiterate maker of a note was lulled into security in signing a negotiable instrument which had been fraudulently misrepresented to him, is sufficient as to those taking with notice of the fraud, without positive or direct assertions, when the fraud may be inferred from circumstances surrounding the transaction. *Grace & Co. v. Strickland*, 188 N. C. 369, 124 S. E. 856.

The principle upon which an unlettered person may not disclaim liability on a note signed by his cross-mark without requiring that it first be read to him, does not apply as to those taking with notice of the fraud, when the one who induced its execution by his acts of fraud, misrepresentations or deceit, had fraudulently lulled him into a feeling of security and induced him to execute the instrument. *Grace & Co. v. Strickland*, 188 N. C. 369, 124 S. E. 856.

**When Endorsee Subject to Equities—When Knowledge of Officer Not Imputed to Bank.**—Where the discount committee of a bank accepts and discounts a note at the request of its officer and member thereof, and the officer is interested therein, the principle of imputed knowledge of the officer of the infirmity of the instrument that would vitiate the note does not apply, and upon conflicting evidence the issue so raised is for the jury to determine under proper instructions of the judge. *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126.

### § 3038. Rights of holder in due course.

**Effect of Renewal Note.**—A note taken in renewal does not extinguish the original note, and those who acquire the latter with knowledge of the infirmity that would vitiate the former may not recover thereon. *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126.

### § 3039. When subject to original defenses.

**Extent of Doctrine—Does Not Apply to Payee Acquiring from Bona Fide Holder.**—This principle that one who acquires title from a holder in due course may recover though he himself may have had notice of the infirmity when he acquired the instrument from such holder was recognized before the enactment of this statute. In Calvert's *Daniel on Negotiable Instruments*, after stating the position that a purchaser with notice of the defect may acquire title from a holder in due course, the author says: "But this rule is subject to the single exception that if the note were invalid as between the maker and the payee, the payee could not himself, by purchase from a bona fide holder, become successor to his rights, it not being essential to such bona fide holder's protection to extend the principle so far." Calvert's *Daniel* (6 ed.), sec. 805. *Pierce v. Carlton*, 184 N. C. 175, 177, 114 S. E. 13.

Where the fraud of a payee of a negotiable note would render the instrument invalid originally in his hands, it will also render the instrument invalid in his hands when, with notice of and participating in the fraud, another has acquired the note by endorsement for value, and, in turn, has endorsed the same to the original payee for value; and the burden is upon the original payee in his action upon the note to show that he had acquired the title as a holder in due course, when the defendant has shown the infirmity in the instrument. *Pierce v. Carlton*, 184 N. C. 175, 114 S. E. 13.

### § 3040. Who deemed holder in due course.

**In General.**—Where the maker of a note alleges and offers evidence tending to show that it had been obtained by fraud, upon the holder, in his action to recover thereon, is cast the burden of showing that he had acquired it bona fide, for value, and without notice. *Bank v. Sherron*, 186 N. C. 297, 119 S. E. 497.

Where there is evidence that a note sued on was affected by an infirmity that would vitiate it, the burden of proof is on one claiming to be a holder in due course without notice, to establish his position before the jury by the greater weight of the evidence. *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126.

While ordinarily one who has acquired a negotiable instrument is prima facie presumed to be a holder in due course, yet when the title is shown to be defective the burden is on him to show that he or some person under whom he claims acquired the title as a holder in due course. *Grace & Co. v. Strickland*, 188 N. C. 369, 124 S. E. 856.

**Intervener by Forwarding Bank.**—Where the forwarding bank intervenes and claims title to a draft of a nonresident debtor attached in the hands of a local bank, the burden is on the intervener to show its title to the property attached, and upon its evidence tending to show prima facie that it was the purchaser of the draft for value, and is a holder thereof in due course, without notice of any defenses or equities, an issue of fact is raised for the determination of the jury. *Sterling Mills v. Saginaw Milling Co.*, 184 N. C. 461, 114 S. E. 756.

In *Mangum v. Mutual Grain Co.*, 184 N. C. 181, 182, 114 S. E. 2, the Court said: "Appellant excepts because his Honor instructed the jury that the burden was on the intervener to make out its claim and to show title to the property attached. We find no error in this instruction. *Moon-Taylor Co. v. Gray-Smith Milling Co.*, 176 N. C. 407, 410, 97 S. E. 213. But when it was shown that the draft, with bill of lading attached, was duly executed and in the possession of the intervener, made payable to its order, the presumption arose that it was a holder in due course."

**Same—Where Evidence Conflicting.**—Where the forwarding bank of a nonresident debtor intervenes in the creditor's action, and claims the proceeds of a draft in the hands of a local bank, in attachment proceedings, and the intervener's officer testifies positively that the intervener was a purchaser for value, in due course, without notice of any infirmity, etc., in the paper, his further testimony, on cross-examination, as to general dealings with the attachment debtor, crediting it with drafts, and charging them back if not paid on presentation, raise the question of the intent between the forwarding bank and its depositor, as to whether the paid draft in question was acquired by the intervener in due course, or whether it had accepted the draft as a mere agency for collection, in which latter event the proceeds of the draft would be subject to attachment in the hands of the local bank; and on this conflicting evidence a direction of the verdict against the intervener is reversible error. *Sterling Mills v. Saginaw Milling Co.*, 184 N. C. 461, 114 S. E. 756.

**No Presumption in Favor of Payee of Unindorsed Note.**—While the possession of a negotiable note by one claiming in due course raises the presumption against the maker that such holder has the legal title, this presumption does not extend to the payee of the unindorsed note. *Hayes v. Green*, 187 N. C. 776, 123 S. E. 7.

## ART. 6. LIABILITIES OF PARTIES

### § 3044. When person deemed indorser.

**Effect of Signature on Back of Note.**—Whatever may have been the law heretofore, under our present negotiable instrument law, a person



placing his name on the back of a note is deemed an indorser unless otherwise indicated. *Gilliam v. Walker*, 189 N. C. 189, 126 S. E. 424, 425.

### § 3047. Liability of general indorser.

**In General.**—In *Wachovia Bank, etc., Co. v. Crafton*, 181 N. C. 404, 405, 107 S. E. 316, considering the negotiable instruments law in general and this section in particular, the court said: "The statute, in this respect as in so many of its other features, is but a codification of the general principles of this branch of the mercantile law as established in the better considered decisions on the subject."

**Note for Gambling Debt.**—The endorsement on a promissory note, negotiable under our statutes, is a new and independent contract, whereby the endorser for value and in due course, among other things, guarantees under this section, that he was a holder in due course at the time of the endorsement, and that the obligation is valid and subsisting; and the endorsee may maintain his action thereon against the endorser independently of whether the note was originally given for a gambling debt made void by C. S., 2142. *Wachovia Bank, etc., Co. v. Crafton*, 181 N. C. 404, 107 S. E. 316.

## ART. 8. NOTICE OF DISHONOR

### § 3092. Who affected by waiver.

**Effect of Express Waiver on Endorser.**—Where a note contains an express waiver of notice, an endorser of such note waives notice. *Gillam v. Walker*, 189 N. C. 189, 126 S. E. 424.

## ART. 9. DISCHARGE

### § 3106. Effect of alteration of instrument.

**In General.**—The closing sentence of this section extends to the holder in due course the right to recover the amount received by the maker on the instrument as originally drawn and enlarges the holder's rights to that extent on the equitable principles which prevail, and sustains the action of *indebitatus assumpsit*. But the former parties of the section are in clear recognition of the principle that a completed instrument fraudulently altered after delivery or materially altered without his assent, will not sustain a recovery against the maker. The significance of this legislation is well brought out in the *Kentucky* case of *commercial Bank v. Arden*, 177 Ky. 520. In that case the court held that the maker of a completed negotiable instrument could not be held liable for the raised value of the paper altered after delivery, without his consent or knowledge. *Broad Street Bank v. Nat. Bank*, 183 N. C. 463, 471, 112 S. E. 11.

The equitable principle upon which the indorsee of a check which has been raised by the payee without the maker's assent, is only permitted to recover from the maker upon an *indebitatus assumpsit*, extends to banking institutions, to individual makers, or general business concerns. *Broad Street Bank v. Nat. Bank*, 183 N. C. 463, 112 S. E. 11.

Where the maker of a check, whether a bank or other corporation, or an individual, fills out the blank spaces by writing in ink and delivers it to the payee as a complete instrument, there is no question of implied agency of the payee to do anything further regarding the negotiation of the instrument as the agent for the maker, and where the payee has fraudulently raised the amount of the check, endorses to another, and receives the money thereon, the maker is not liable to the endorsee except in an action for the original or true amount of the check, upon equitable principles, and allowed by our negotiable instrument law. *Broad Street Bank v. Nat. Bank*, 183 N. C. 463, 112 S. E. 11.

**Failure of Bank to Use Safety Devices.**—Where completed checks issued by a bank upon its regular form of checks have been signed by its proper officer, raised by the payee, and endorsed to and cashed by another bank, which brings action against the maker bank for the full amount of the altered checks, the failure of the maker bank to use sensitized paper to prevent chemical erasures and a protectograph, with perforated figures, to prevent fraudulent alterations, is too remote to afford the basis of an action either in tort or contract, or to be considered the proximate cause of the injury, upon an issue of negligence; and the plaintiff is confined to his action for the true amount for which the checks were originally made. *Broad Street Bank v. Nat. Bank*, 183 N. C. 463, 112 S. E. 11.

**Same—Equitable Principles Not Applicable.**—The equitable principle that where one of two innocent persons must suffer, the law will cast the loss upon him who has put it in the power of another to do the injury, ordinarily arises in instances of fraud or breaches of trust involved in the contract of agency, where one clothed with the real or apparent authority to act for another in the premises has in excess or breach of the authority given, acted to another's injury; and not to instances wherein the maker of a check has filled in the blank places with ink, has signed the same and delivered it to the payee as a completed instrument, and the payee has raised the check to a larger amount, without the assent of the maker, and has fraudulently obtained cash thereon from another, by endorsement. *Broad Street Bank v. Nat. Bank*, 183 N. C. 463, 112 S. E. 11.

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## CHAPTER 62

### OFFICES AND PUBLIC OFFICERS

#### ART. 1. GENERAL PROVISIONS

#### § 3201. Holding office contrary to the constitution; penalty.

If any person presumes to hold any office, or place of trust or profit, or is elected to a seat in either house of the general assembly, contrary to the seventh section of the fourteenth article of the constitution of the state, he shall forfeit and pay two hundred dollars to any person who will sue for the same. [*Provided*, such action shall not be brought or maintained by any person who is not a bona fide resident of the same county in which the defendant resides.] (Rev., s. 2365; Code, s. 1870; R. C., c. 77, s. 1; 1790, c. 319; 1792, c. 366; 1793, c. 393; 1796, c. 450; 1811, c. 811; 1924, c. 110.)

#### § 3205. Officer to hold until successor qualified.

An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agents regularly appointed, and who have qualified to act in that capacity according to the terms of this and other valid statutes directly applicable, is not in strictness a money demand, under section 867, which must be proceeded with as an ordinary civil action requiring a finding of disputed facts by a jury, but comes under section 868, providing that the summons may be returnable before the judge at chambers or in term, who shall determine all issues of law and fact unless a jury is demanded by one or both of the parties, which, in the instant case, came too late, being taken for the first time



without exceptions in an additional brief allowed to be filed after the argument of the case in the Supreme Court has been made. *Tyrrell v. Holloway*, 182 N. C. 64, 108 S. E. 337.

## ART. 2. REMOVAL OF UNFIT OFFICERS

### § 3208. Officers subject to removal; for what offenses.

**In General.**—The proceeding before the Judge of the Superior Court under this section, is of a civil nature for the protection of the public, and is not a criminal proceeding against the officer. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174.

**What Evidence Sufficient.**—The evidence of a prosecuting attorney in proceedings before the judge to remove him from office, under this section is sufficient to sustain an order removing him when it admits that he attempts to induce, and did induce, a person to violate the statutes of our State in participating in acts made an offense for immorality, etc., whatever his intent may have been therein. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174. It was also held in this case that the prosecuting attorney could not complain because he was removed not in accordance with the specifications alleged in the petition, but upon his own evidence, the element of surprise or possibility of an amendment to the petition not entering. Ed. Note.

**Jury Not Required.**—The proceedings under this section do not require an issue to be submitted to the jury. Upon the defendant's own admissions in this case, and evidence, he is guilty of the offense charged, which is sufficient to remove him from office; such office is not a property right under the provisions of the Constitution of North Carolina, Art. 1, § 19. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174.

**Appeal from Superior Court.**—An appeal from the judgment of the Superior Court judge that a prosecuting attorney be removed for "willful misconduct or maladministration in office," etc., is upon questions of law and legal inferences, if justified by the findings of facts supported by evidence, Constitution, Art. VI, § 8; and the appeal is allowed by C. S., 638. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174.

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## CHAPTER 63

### PARTITION

#### ART. 1. PARTITION OF REAL PROPERTY

### § 3214. Venue in partition.

The proceeding for partition, actual or by sale, must be instituted in the county where the land or some part thereof lies. If the land to be partitioned consists of one tract lying in more than one county, or consists of several tracts lying in different counties, proceedings may be instituted in either of the counties in which a part of the land is situated, and the court of such county wherein the proceedings for partition are first brought shall have jurisdiction to proceed to a final disposition of said proceedings, to the same extent as if all of said land was situate in the county where the proceedings were

instituted. (Rev., s. 2486; Code, s. 1898; 1868-9, c. 122, s. 7; 1924, c. 62.)

**Editor's Note.**—The latter part of the section, stating the extent of the jurisdiction of the court is new, as is also the provision for partition of land consisting of several tracts.

**Waiver of Venue.**—Construing C. S., secs. 469, 470, and this section, in *pari materia*, venue cannot be jurisdictional, and it may always be waived. Pleading to the merits waives defective venue. Venue is a matter not to be determined by the common law, but by legislative regulation. *Clark v. Carolina Homes (N. C.)*, 128 S. E. 20, 25.

### § 3215. Petition by cotenant.

**When Title of Remainderman Affected.**—A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceeding for a division or sale for that purpose, brought before the clerk of the court under the provision of this section, and these proceedings so brought cannot be validated by derivative jurisdiction in the Superior Court, on appeal, under the provisions of C. S., 1744, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements, for the protection of contingent remaindermen, which must be strictly followed: and, though under C. S., 3234, 3235, a sale is provided when the land is affected with contingent interest in remaindermen, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen and not upon that of the life tenants. *Ray v. Poole*, 187 N. C. 749, 123 S. E. 5.

### § 3218. Unknown parties; summons and representation.

See notes to § 1744.

**Title Not Affected by Missing Heir.**—Where, in special proceedings for the partition of lands among the deceased owners, it is properly made to appear that one of them has been missing for twenty years or more and cannot be found, nor can it be ascertained whether or not he had children or lineal descendants; that summons has been issued for him, returned not to be found, and then pursuant to this section, notice by publication had been duly published for him or his descendants, without avail, and the interests of each of the parties has been duly ascertained and established; it is held, under a motion to collect the purchase money under bid by a purchaser at sale for division, that such purchaser may not successfully resist payment on the ground of a defect in title for that the commissioner's deed would not preclude the claims of the missing heir or his heirs; but that the decree should provide for the reinvestment or security of the share of the missing party or his real representatives, which however, in no wise affects the title to be conveyed. *Bynum v. Bynum*, 179 N. C. 14, 101 S. E. 527.

### § 3219. Commissioners appointed.

The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. [*Provided*, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted.] (Rev., s. 2487; Code, s. 1892; 1868-9, ch. 122, s. 1; 1924, c. 62.)



### **§ 3222. Commissioners to meet and make partition; equalizing shares.**

**Applies Only to Compulsory Partition or Sale.**—"Where the partition is a compulsory or judicial one there is express statutory authority by this section for the more valuable shares to be charged with sums to be paid to those of inferior value for the purpose of novelty or equality of divisions." In *Outlaw v. Outlaw*, 184 N. C. 255, 258, 114 S. E. 4. In this case the partition was not compulsory but was under an agreement between cotenants, consequently this section was not applicable and the case contained no further construction thereof. Ed. Note.

### **§ 3230. Confirmation and impeachment of report.**

**Under the Acts of 1837.**—For a case where proceedings for a partition of lands were under the provisions of chapter 85 Revised Statute of 1837, which did not contain provisions similar to this section and the section immediately following, see *Power Co. v. Taylor*, 188 N. C. 351, 124 S. E. 634.

### **§ 3231. Report and confirmation enrolled and registered; effect.**

**Effect of Adjudication Before Clerk.**—In proceedings to partition lands among tenants in common, the adjudication before the clerk of the Superior Court operates as an estoppel as to them and those in privity with them, when no appeal has been taken. *Southern State Bank v. Levere*, 187 N. C. 743, 123 S. E. 68.

## **ART. 2. PARTITION SALES OF REAL PROPERTY**

### **§ 3234. Remainder or reversion sold for partition; outstanding life estate.**

**Proceedings of Life Tenant Affecting Title of Remaindermen.**—A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of C. S., 3215, and these proceedings so brought cannot be validated by derivative jurisdiction in the Superior Court, on appeal, under the provisions of C. S., 1744, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements, for the protection of contingent remaindermen, which must be strictly followed; and, though under this and the following section, a sale is provided when the land is affected with contingent interest in remainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants. *Ray v. Poole*, 187 N. C. 749, 123 S. E. 5.

### **§ 3235. Life tenant as party; valuation of life estate.**

See notes to section immediately preceding.

### **§ 3245. Shares to persons unknown or not sui juris secured.**

**Effect on Title.**—This section, in nowise interferes with power to free title and make a valid conveyance of the same. *Bynum v. Bynum*, 179 N. C. 14, 17, 101 S. E. 527.

## CHAPTER 64

**PARTNERSHIP**

## ART. 1. LIMITED PARTNERSHIP

**§ 3259. General and special partners; liability.**

**Nature of Liability.**—Under the provisions of this section, the liability of each partner for the firm's debts is made both joint and several, and the English equitable doctrine that requires the firm's creditors to exhaust the partnership assets and then call in aid the property of the individual partner for the unpaid balance of the firm's debts no longer obtains in this jurisdiction. As to whether the individual and private creditors of a deceased partner are entitled to share ratably with the creditors of the partnership in the deceased partner's interest in the firm assets, *quere?* *Virginia-Carolina Chemical Co. v. Walston*, 187 N. C. 817, 123 S. E. 196.

## ART. 3. BUSINESS UNDER ASSUMED NAME REGULATED

**§ 3288. Certificate filed; contents.**

See notes to section 3291.

**In General.**—"This statute manifestly is for the protection of creditors of persons who fail to comply with its provisions, or of others who do business with them. The consequences of a violation of the statute are prescribed by C. S., § 3291. They seem to be limited to punishment as a misdemeanor, for it is expressly provided that failure to comply with this section, shall not prevent a recovery in a civil action by the person who shall violate the statute." *Farmers' Bank, etc., Co. v. Murphy*, 189 N. C. 79, 127 S. E. 527, 529.

**§ 3291. Violation of article misdemeanor.**

See note to § 3288.

**When Courts Will Not Lend Aid.**—"The courts will not lend their aid to extend a highly penal statute, although it is within the police power, unless the case comes within the letter of the law, and also within its meaning and palpable design. It is just as clearly the policy of the law that it will not lend its aid in enforcing a claim founded on its own violation." *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629, 631.

**Courtney v. Parker Overruled by 1919 Amendment.**—The proviso added to this section by Public Laws 1919, c. 2, overrules *Courtney v. Parker*, 173 N. C. 479, 92 S. E. 324, holding that a failure to comply with section 3288 will prevent recovery in a civil action. *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629.

This section does not authorize the rejection of an answer of a defendant in a civil case who has not complied with § 3288. *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629.

**Same—Contracts Not Void.**—"It is clear by express enactment, that the Legislature intended by adding the proviso that the punishment should be confined to the fine or imprisonment, set out in this section, but that contracts made by persons, carrying on or conducting or transacting the business in violation of this statute, should not be void." *Security Finance Co. v. Hendry*, 189 N. C. 549, 127 S. E. 629, 631.



## CHAPTER 65

## PROBATE AND REGISTRATION

## ART. 1. PROBATE

**§ 3293. Officials of state authorized to take probate.**

**Judicial or Quasi Judicial Act.**—The taking of acknowledgment of a deed by an officer, authorized by statute to do so is a judicial, or at least a quasi judicial act. *Best v. Utley*, 189 N. C. 356, 127 S. E. 337.

**§ 3299. Probate where clerk is a party.**

See notes of *Cowan v. Dale*, under section 3311.

**§ 3305. Clerk to pass on certificate and order registration.**

**Section Mandatory.**—Where the decisions of the State Supreme Court and those of the Federal Courts are conflicting in the interpretation of State statutes affecting title to real property situated within the State boundaries, the State decisions will control; and in this case it is held under such conflicting authority, that this section requiring clerks of the Superior Court to adjudicate upon the probate to a deed for lands situated here is mandatory, and its omission will invalidate the conveyance as against the rights of purchasers and creditors. *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 870.

In order to the validity of a conveyance of lands, it is a mandatory requirement of our statute, brought forward and now found in this section, that the clerk of the court adjudicate the sufficiency of the act of the probate officer before whom the grantor's acknowledgment has been taken, and issue his fiat or order for registration; and while it is held that such act is directory upon the clerk of the Superior Court of the county wherein the land is situated, it is only thus where such fiat or order of registration has been properly made by the clerk of another county upon which such power has been conferred by the statute, and in the absence of any proper fiat or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the grantor. *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 870.

The opinions of the Supreme Court should be construed in the view of the subject-matter as presented in each particular decision, and it is held, in reviewing the former decisions upon the question, that this section is mandatory in requiring that the clerk of the Superior Court adjudicate upon the probate taken to a conveyance of land, and issue his fiat or order of registration; though it is not necessary to its validity that the clerk of the Superior Court of the county wherein the land is situated should have passed upon such fiat or order for registration made by the clerk of another county, clothed with authority to do so by the statute. *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 870.

**Ineffectual Probate.**—The probate to a mortgage of lands situated in North Carolina, taken by the commissioner of deeds in another State, registered without the fiat or order for registration by a clerk of the Superior Court within the State, and clothed with authority to do so by our statute, is ineffectual as against purchasers or creditors to pass title to the purchaser at the foreclosure sale, or those claiming under him. *Champion Fibre Co. v. Cozad*, 183 N. C. 600, 112 S. E. 870.

**Woman May Make Certificate.**—A woman is qualified to act as a notary public since the adoption of the amendment to the Constitution of this State, Art. VII, sec. 7; and also to pass upon the proper probate of

a deed to lands, and make a valid certificate for its registration, when deputized by the clerk of the Superior Court under the provisions of our statutes. *Preston v. Roberts*, 183 N. C. 62, 110 S. E. 586.

## ART. 2. REGISTRATION

### § 3309. Conveyances, contracts to convey, and leases of land.

**Scope of Section—Parol Leases.**—In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered in the proper county, and, consequently, the lease must be in writing; and hence a parol lease, void under sec. 988, cannot have this effect. *Mauney v. Norvell*, 179 N. C. 628, 103 S. E. 372. See notes of this case under sec. 988.

**Same—Parol Trusts.**—Certain parol trusts in land are enforceable in this jurisdiction when the holder of the legal title, or those claiming under him, have not acquired it for a fair and reasonable value without notice; and the Connor Act, which is this section, requiring notice by registration as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, necessarily, in contemplation of the express provisions of the statute, refer to such instruments as are in writing and capable of registration. *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32.

When the plaintiff seeks to engraft a parol trust in his favor against the holder of the legal title to lands, only a bona fide purchaser for value without notice is protected, and this under the broad principles of equity, and creditors expressly referred to in this section, are not included. *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32.

**Same—Mortgages.**—Mortgages have been uniformly held by this Court to be conveyances of the legal title, and require the formality of a conveyance in their assignment as against purchasers for value, and, therefore, as against purchasers, the legal title vested in the mortgagee comes within the provisions of the registration act, and this section includes mortgages within its terms. *First Nat. Bank v. Sauls*, 183 N. C. 165, 170, 110 S. E. 865.

**Same—Creation of Building Restrictions.**—A building restriction, being an easement, which must be created by a grant is within this section. *Davis v. Robinson*, 189 N. C. 589, 127 S. E. 697.

**Notice Insufficient.**—In construing this section the Court has repeatedly held that no notice, however full and formal, of an unregistered deed conveying land, or of an unregistered contract to convey land, or of an unregistered lease of land, for more than three years shall defeat or affect the rights of a subsequent purchaser for value whose deed is duly registered. *Roberts v. Massey*, 185 N. C. 164, 166, 116 S. E. 407.

The mere possession of the locus in quo under an unregistered ninety-nine-year lease is not sufficient notice to the owner of the fee under a valid paper chain of title. *Dye v. Morrison*, 181 N. C. 309, 107 S. E. 138.

The owner of the fee by a registered chain of title is not affected with notice of a ninety-nine-year lease under which an adverse party claims from a common source until the registration of the lease, no other notice being sufficient under the provisions of this section. *Dye v. Morrison*, 181 N. C. 309, 107 S. E. 138.

**Priorities—Between Unregistered Deed and Execution of Judgment.**—A sale of land under the execution of a judgment in the due course and practice of the court, and conveyance to the purchaser at the sale, regular in form and sufficiently describing the land, conveys the title superior to that of an unregistered deed from the judgment debtor to another, previously made, no notice, however formal, being sufficient to supply that required by registration; though a mortgage for the balance of the



purchase price had been given by the grantee of the debtor, and duly registered before the docketing of the judgment, under the execution of which the conveyance had been made to the purchaser at the sale. *Wimes v. Hufham*, 185 N. C. 178, 116 S. E. 402.

**Same—Between Docketed Judgment and Unrecorded Deed.**—The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. *Eaton v. Doub* (N. C.), 128 S. E. 494.

**Same—Between Landlord's Lien and Registered Mortgage.**—The principle upon which the mortgagee by parol agreement may become the landlord and the mortgagor his tenant of the mortgaged land after the mortgagor's default, cannot give the landlord before default a lien for supplies, etc., superior to the lien of a chattel mortgage upon the crops raised, when the mortgagee has received and registered his mortgage while the mortgagor was in possession of the premises and before the default occurred or the parol agreement had been made. *Warrington v. Hardison*, 185 N. C. 76, 116 S. E. 166.

**Registration as Affecting Commencement of Limitations.**—The statute of limitations does not begin to run in favor of the lessee in possession under a ninety-nine-year lease of lands until the registration of the lease, as against the owner of the fee under a paper chain of title from a common source. *Dye v. Morrison*, 181 N. C. 309, 107 S. E. 138.

### § 3310. Unregistered deeds prior to January, [1890], registered on affidavit.

Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand eight hundred and [ninety], may have the same registered without proof of the execution thereof by making an affidavit, before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto, are dead or cannot be found, that he cannot make proof of their handwriting, and that affiant believes such deed to be a bona fide deed and executed by the grantor therein named. This section shall not interfere with vested rights nor shall a deed so admitted to record be used as evidence in any action now pending. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds. (Rev., s. 981; 1885, c. 147, s. 2; 1905, c. 277; 1913, c. 116; 1915, cc. 13, 90; 1924, c. 56.)

### § 3311. Deeds of trust and mortgages, real and personal.

**Purpose.**—This section was intended primarily to protect creditors and purchasers, and not to attach to the instrument additional efficacy as between the mortgagor and the mortgagee. *South Georgia Motor Co. v. Jackson*, 184 N. C. 328, 331, 114 S. E. 478.

**Notice Insufficient.**—The Court decisions in this State construing this section have insistently held that no notice, however full or formal, shall avail to defect a prior registration. *Blacknall v. Hancock*, 182 N. C. 369, 371, 109 S. E. 72.

**Determination of Priorities between Mortgages.** — The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be determined by the time of filing for registration, and their relative position on the index.

Attention is called to ch. 68, Laws 1921, amending C. S., 3553, though not applicable to the instant case. *Blacknall v. Hancock*, 182 N. C. 369, 109 S. E. 72.

A mortgage executed and registered contemporaneously with a deed by the same parties to the same land, to secure the balance of the purchase price, is one act, giving the mortgage a lien on the land described superior to that of a later executed and registered mortgage thereon. *Allen v. Stainback*, 186 N. C. 75, 118 S. E. 903.

**Statement that Mortgage Is Subject to Prior Unregistered Mortgage.**

—A chattel mortgage stating that it was made subject to a prior mortgage on the same property to secure the payment of a certain sum of money is, by its express terms, in recognition of the existing prior mortgage, and only purporting to convey the mortgaged property to that extent, does not require registration of the prior mortgage, or the notice therein required by statute, to make the obligation more effective between the parties to the agreement and the prior encumbrancer. *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215.

Where a chattel mortgage is given and accepted subject to a prior mortgage, an instruction in an action thereon that makes registration of the first mortgage in the proper county necessary to the enforcement of the condition upon which the later mortgage was given, is reversible error. *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215.

**Sale of Mortgaged Property.**—Where the mortgagor of an automobile has sold it to another after the registration of the mortgage, in claim and delivery, there was conflicting evidence as to whether the mortgage gave permission for the sale. It was held, that an instruction that the registration of the mortgage was notice of the lien to the defendant purchaser, and he acquired the automobile subject to the mortgage lien, unless the jury find that the plaintiff mortgagee had waived the right to his lien, is correct. This principle is distinguished from one in which a mortgage is taken of an entire stock of goods which were left with the mortgagor for sale. *Rogers v. Booker*, 184 N. C. 183, 113 S. E. 671.

**Effect of Clerk's Interest.** — The probate of a deed or mortgage is a judicial act; hence, if the probate or the grantor's acknowledgment be taken by an officer who is disqualified, the probate or certificate of acknowledgment will be void, and the registration of the instrument will be ineffective to pass title, and may be regarded a nullity as to subsequent purchasers or incumbrancers. *Nemo debet esse iudex in propria sua causa*. *Cowan v. Dale*, (N. C.), 128 S. E. 155, 156.

The deputy clerk who probated the chattel mortgage, was one of the grantees therein, and by reason of his interest he was not qualified to exercise this particular judicial function. An officer who has a pecuniary interest in a deed or mortgage as a party, trustee, or cestui que trust is disqualified to probate it or to take the acknowledgment of its execution. *Cowan v. Dale* (N. C.), 128 S. E. 155, 156.

## § 3312. Conditional sales of personal property.

**Sufficiency of Form.**—The certificate of registration of a contract of sale of personal property reserving title need not be in any particular form to meet the requirement for registration, and is sufficient if it conforms in its material parts to this section. *Manufacturers' Finance Co. v. Mills Co.*, 182 N. C. 408, 109 S. E. 67.

Where the certificate for registration of a contract of sale of personal property thereon appears to have been "subscribed before" a notary public, with the seal attached showing the county, and has been certified to for registration by the clerk of the court of that county, and in the caption of the contract also appears the name of the county and state in which it had been registered, and by reference to the certificate and the paper to which it relates the names of the parties sufficiently appears, it



was held, that the contract is sufficient in form for the purposes of registration as to the venue, the name of the party, and as to its having been sufficiently acknowledged; the fact that it was sworn to as well as subscribed is regarded as surplusage and immaterial. *Manufacturers' Finance Co. v. Cotton Mills Co.*, 182 N. C. 408, 109 S. E. 67.

**Interest of Innocent Party in Unregistered Mortgage Not Subject to Confiscation.** — Failure to register a mortgage taken to secure payment on an automobile, will not subject the interest of an innocent mortgage to confiscation for violation of section 3403 relating to seizure of automobiles engaged in illegal transportation of liquor. *South Georgia Motor Co. v. Jackson*, 184 N. C. 328, 114 S. E. 478.

### ART. 3. FORMS OF ACKNOWLEDGMENT, PROBATE AND ORDER OF REGISTRATION

#### § 3323. Acknowledgment by grantor.

**Acknowledgment Taken Over Telephone.**—Section 997, providing the proper mode of conveyance of real property by husband and wife of his lands, tenements and hereditaments, contemplates that the acknowledgment and the privy examination of the wife provided for shall be made in the presence of the officer, which is emphasized by this section and section 3324 as to acknowledgments of grantors and married women; and such acknowledgment, taken of the wife over a telephone, does not meet the statutory requirements, and renders the conveyance invalid as to her. *Southern State Bank v. Sumner*, 187 N. C. 762, 122 S. E. 848.

#### § 3326. Corporate conveyances.

**Substantial Compliance.**—Where the probate of a corporation's deed for land is in substantial compliance with this section, parol evidence is competent, in an action attacking its validity, that tends to corroborate the recitations of the probate, and to further show that the president and secretary had proper authority to act therein on its behalf. *Bailey v. Has-sell*, 184 N. C. 450, 115 S. E. 166.

While it is the better course to follow the suggested methods of this section, in the execution of a corporate chattel mortgage, there being no general law or charter provision to the contrary, it is not necessary to its validity that the witness to the probate certifies in its probate that he saw the presiding member sign it, when otherwise it complies with the requirements of the general law. *Merchants, etc., Bank v. Pearson*, 186 N. C. 609, 613, 120 S. E. 210.

**Same—Seal of Corporation.**—It is not necessary to the valid probate of a deed made by a corporation that it literally follows the statutory printed forms of this section if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary, each acting in his official capacity, or as representing the corporation, who is designated as "the grantor, for the purpose therein expressed," it is sufficient; and the finding of the jury, upon evidence, that their officials were properly authorized to act for and in behalf of the corporation, and had so acted; and had used the word "seal" enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the "seal" seems to be cured under the provisions of C. S., 3354, and as to signatures of the officials by C. S., 3355. *Bailey v. Has-sell*, 184 N. C. 450, 115 S. E. 166.

Where a conveyance of land purports upon its face to be the act of a corporation, and the word "seal" with a scroll has been used thereon, it is competent to show that the corporation had adopted for the purpose the word "seal" with a scroll in the place of the corporate stamp seal, which had been broken and could not be used; and that the official

signed as such were thereto authorized by the directors and stockholders of the corporation, although this section had not been strictly, though substantially, followed, the presumption being that the officer taking the probate had complied with the requirements of the law as to corporate probate. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166.

**Power of Equity to Correct.**—Semble, the power of courts of equity to correct, reform, and reexecute an instrument upon sufficient allegation and proof extends to the probate of corporation deeds, when it thereon appears that the president and secretary have executed it in behalf of the corporation in substantial compliance with the printed form of this section. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166.

#### ART. 4. CURATIVE STATUTES; ACKNOWLEDGMENTS; PROBATES; REGISTRATION

### § 3331. Defective certification or adjudication of clerk, etc., admitting to registration.

**Probate Presumed Valid.**—The admission to registration of a mortgage raises a presumption that the probate was by the proper officer and regular, which has to be met by the evidence of a latter registered mortgage claiming its invalidity; and, the validity of the probate of the mortgage in this case was established by this section, validating orders of probate by the clerk made prior to 1 January, 1919. *Allen v. Stainback*, 186 N. C. 75, 118 S. E. 903.

### § 3333. Official deeds omitting seals.

All deeds executed prior to August 22, 1924, by any sheriff, commissioner, receiver, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall be good and valid nevertheless: *Provided*, this act shall not apply to actions pending August 22, 1924. (1907, c. 807; 1917, c. 69, s. 1; 1924, c. 64.)

**Editors Note.**—The act of 1924 reenacted this section, bringing it down to date and inserting receivers in the list of officers.

### § 3351. Wife free trader; no examination or husband's assent.

**Section 2515 Not Affected.**—This section does not affect section 2515, requiring the additional certificate in deed of wife of her separate realty to her husband. *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834.

**Deed to Husband.**—It is not within the meaning or intent of this section purporting to insure defective execution of deeds of married women, free traders, that it should apply to deeds made directly to the husband, or annul the requirement that the probate officer certify that it was not unreasonable or injurious to her; but this should only apply to such conveyances made to third persons in respect to the husband's assent, etc., coming within the provisions of the section referred to, when the grantor is a free trader; whether this section would be constituted otherwise, *Quaere?* *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834. See notes of this case under section 2515.

Where, under a void deed from his wife of her separate realty, the husband has conveyed the lands to a third person, the purchaser cannot acquire any right under his deed as a purchaser without notice against the child or heir at law of the deceased wife, but only as against the life estate of his grantor as tenant by the curtesy in his wife's lands;



and the heirs at law of the wife, after the expiration of the husband's life estate, are entitled to actual division of the lands as tenants in common or a sale for division, as the case may be, in proceedings for petition. *Foster v. Williams*, 182 N. C. 632, 109 S. E. 834.

**§ 3353. By president and attested by witness before January, 1900.**

**How Priority Determined.**—The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be determined by the time of filing for registration, and their relative position on the index. Attention is called to ch. 68, Laws 1921, amending C. S., 3553, though not applicable to the instant case. *Blacknall v. Hancock*, 182 N. C. 369, 109 S. E. 72.

**§ 3354. Corporate name not affixed, but signed otherwise, prior to January, 1919.**

**Curing Defects.**—It is not necessary to the valid probate of a deed made by a corporation that it literally follow the statutory printed forms in section 3386, if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary, each acting in his official capacity, or as representing the corporation, who is designated as "The grantor, for the purpose therein expressed," it is sufficient; and the finding of the jury, upon evidence, that these officials were properly authorized to act for and in behalf of the corporation, and had so acted; and had used the word "seal" enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the "seal" seem to be cured under the provisions of this section, and as to signatures of the officials by C. S., 3355. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166.

**§ 3355 (a). Certificate alleging examination of grantor instead of witness.**

Wherever any deed of conveyance registered prior to January first, eighteen hundred and eighty-six, purports to have been attested by two witnesses and in the certificate of probate and acknowledgment it is stated that the execution of such deed was proven by the oath and examination of one of the grantors in said deed instead of either of the witnesses named, all such probates and certificates are hereby validated and confirmed, and any such deed shall be taken and considered as duly acknowledged and probated: *Provided*, this section shall not affect litigation pending Feb. 27, 1925. (1925, c. 84.)

**§ 3362. Before commissioners of deeds.**

**Does Not Interfere with Vested Rights.**—This section is remedial in character and beneficent in purpose—making for the saving of titles, and not their destruction—yet they will not be permitted to impair or to interfere with the vested rights of others. *Champion Fibre Co. v. Cozard*, 183 N. C. 600, 611, 112 S. E. 810. See notes of this case under section 3305.

**Same—Purchasers At Execution Sale.**—This section cannot have the effect of impairing vested rights of purchasers at an execution sale under

judgment, or those holding the land under his deed. *Champion Fibre Co. v. Cozard*, 183 N. C. 600, 112 S. E. 870.

**§ 3366 (g) 1. Acknowledgments taken by stockholder, officer, or director of bank.**

No acknowledgment or proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any banking corporation taken prior to the first day of January, one thousand nine hundred and twenty-four, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder, officer, or director in such banking corporation: *Provided*, that this act shall not affect litigation pending August 22, 1924. (1924, c. 68.)

**§ 3366 (g) 2. Acknowledgment and registration by officer or stockholder in building and loan association.**

All acknowledgments and proofs of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association prior to the tenth day of August, one thousand nine hundred and twenty-four, shall not be, nor held to be, invalid by reason of the fact that the clerk of the Superior Court, justice of the peace, notary public, or other officer taking such acknowledgment, proof of execution or privy examination, was an officer or stockholder in such building and loan association; but such proofs and acknowledgments of all such instruments, and the registration thereof, if in all other respects valid, are hereby declared to be valid.

Nor shall the registration of any such mortgage or deed of trust ordered to be registered by the clerk of the Superior Court, or by any deputy or assistant clerk of the Superior Court, be or held to be invalid by reason of the fact that the clerk of the Superior Court, or deputy, or assistant clerk of the Superior Court, ordering such mortgages or deeds of trust to be registered was an officer or stockholder in any building and loan association, whose indebtedness is secured in and by such mortgage or deed of trust. (1924, c. 108.)

**§ 3366 (j) 1. Certificates of clerks without seal.**

All certificates of acknowledgment and all verifications of pleadings, affidavits, and other instruments heretofore executed by clerks of the Superior Court of the State and which do not bear the official seal of such clerks, are hereby validated in all cases in which the instrument bearing such acknowledgment or certification are filed or recorded in any county in the State other than the county in which the clerk executing such certificates of acknowledgment or verifications resides, and such acknowledgments and verifications are hereby made and declared to be binding, valid and effective to the same extent and in the same manner as if said official seal had been affixed. (1925, c. 248.)



## CHAPTER 66

## PROHIBITION

## IN GENERAL.

**Conflict between State and Federal Statute.**—In case of conflict between the Volstead Act, valid under the Eighteenth Amendment to the Constitution of the United States, and a State statute on the subject of prohibition, the Federal statute controls; but where the Federal law goes further than the State statute, and makes indictable an offense not embraced within the provisions of the latter, or where the State statute excepts such act from its general provisions, so that it is not indictable thereunder, the State court has no jurisdiction of the offense, and a conviction may only be had under an indictment in the United States court. *State v. Barksdale*, 181 N. C. 621, 107 S. E. 505.

## ART. 1. MANUFACTURE AND SALE OF INTOXICATING LIQUORS

## § 3367. Unlawful to manufacture or sell.

See notes to section 3375.

**Manufacture of Wine.**—Findings of the trial judge, in imposing a sentence on the defendant under a suspended judgment, that the defendant had manufactured and had in his possession 150 gallons of wine, and had bought grapes therefor in another county, and persons had been seen coming from his place intoxicated, are insufficient for the imposition of the sentence, the manufacture of wine from grapes not being prohibited by this section, and the mere possession, unless for the purpose of sale, being lawful. Nor is it *prima facie* evidence of guilt if the wine had been manufactured from grapes grown on the owner's premises. *State v. Hardin*, 183 N. C. 815, 112 S. E. 593.

## § 3368. Intoxicating liquors defined.

See notes to section 3375.

## ART. 2. SALE OF NEAR-BEER AND OTHER SPECIFIED DRINKS

## § 3373. Unlawful to sell near-beer and other mixed drinks.

See notes to section 3375.

## § 3375. Construction of article.

**"Flavoring Extracts."**—This chapter dealing with the subject of prohibition, provides by art. 2, sec. 3373, an amendment theretofore enacted in 1911, that it is unlawful to sell or dispose of intoxicating liquors for gain, "except as hereinafter provided," followed in this section, with the proviso, excepting "flavoring extracts when sold as such." By express terms of the statute, the amendment of 1911, placed in art. 2 of C. S., ch. 66, "flavoring extracts when sold as such" were excluded from the operation of the general law; and any other interpretation would leave the language of the exception altogether without meaning and contravene the manifest purpose of the Legislature. *State v. Barksdale*, 181 N. C. 621, 107 S. E. 505.

**Same—"Imitation Extracts."**—Where an agent is indicted for violating our State prohibition law, C. S., 3367, and there is evidence tending

to show that though he had sold flavoring extracts containing 40 per cent alcohol, they came within the exception of this section, the mere fact that the bottles containing it are labeled "imitation extracts" does not preclude him from establishing his innocence by showing that the word "imitation" had reference alone to the flavor they were endeavoring and intending to produce. *State v. Barksdale*, 181 N. C. 621, 107 S. E. 505.

**Same—Question for Jury.**—Where the State satisfies the jury beyond a reasonable doubt that the defendant has violated section 3367, by selling or offering for sale intoxicating liquors, or those containing alcohol sufficient to make men drunk, the defendant so indicted must be convicted under the provisions of our prohibition law, C. S., ch. 66, unless he has satisfied the jury with his evidence that the liquors he has sold or offered for sale were in fact and truth flavoring extracts and sold or offered for sale as such. *State v. Barksdale*, 181 N. C. 612, 107 S. E. 505.

Where the evidence offered by the State is sufficient to convict the defendant under the provisions of C. S., 3367, of selling or offering for sale an intoxicating liquid sufficient to make men drunk, and there is evidence on the defendant's behalf that the liquid was in truth and fact a flavoring extract coming within the exception of this section and only sold or offered for sale as such, the question of guilt or innocence of the defendant depends upon the verdict of the jury upon the conflicting evidence, and it is error for the trial judge to direct a verdict of guilty upon the issue, as a matter of law. *State v. Barksdale*, 181 N. C. 621, 107 S. E. 505.

**Same—Volstead Act.**—The Volstead Act, sec. 4, recognizes and provides for the lawful sale of flavoring extracts, when they are unfit for use as a beverage or for intoxicating beverage purposes, and is not in conflict with this section when such extracts are unfit for drinking purposes. *State v. Barksdale*, 181 N. C. 621, 107 S. E. 505.

**Same—Federal Permit—Agricultural Department Standard.**—Where there is sufficient evidence on the part of the State to show that the defendant was guilty of offering for sale or selling intoxicating liquor prohibited by C. S., 3367, and also on defendant's behalf that the liquid was a flavoring extract coming within the exception of this section and only sold or offered for sale as such, it is competent for the defendant to introduce in evidence the permit of the Federal prohibition officer allowing the manufacture of the formula for the extracts the defendant was selling, also the standard as to the use of alcohol in flavoring extracts established by the Agricultural Department, as tending to show his good faith and that the liquid so offered by him was what it purported to be, a flavoring extract, and not sold for a beverage. *State v. Barksdale*, 181 N. C. 621, 107 S. E. 505.

#### ART. 4. SEARCH AND SEIZURE LAW

### § 3378. Handling liquor for gain.

See notes to § 3383.

**A loan of intoxicating liquor** upon a promise that it should be returned in kind is a violation of our prohibition law, and where there is further evidence that the buyer had promised to pay in money, rejection of testimony as to whether the defendant had eventually been paid is immaterial either the barter or the promise to pay being sufficient. *State v. Lemons*, 182 N. C. 828, 109 S. E. 27. See notes of this case under section 4625.

### § 3379. Keeping liquor for sale; evidence.

See notes to §§ 3383, 3385.

**Possession of Wine.**—Findings of the trial judge, in imposing a sentence on the defendant under a suspended judgment, that the defendant had



manufactured and had in his possession 150 gallons of wine and had bought grapes therefor in another county, and persons had been coming from his place intoxicated, are insufficient for the imposition of the sentence, the manufacture of wine from grapes not being prohibited by the State law (C. S., 3367), and the mere possession, unless for the purposes of sale, being lawful. Nor is it *prima facie* evidence of guilt if the wine had been manufactured from grapes grown on the owner's premises. *State v. Hardin*, 183 N. C. 815, 112 S. E. 593.

**Sufficient to Sustain Conviction.**—Where the defendant has been arrested and eight quarts of spirituous liquor found in a suit-case he was carrying into the house of another, its possession is *prima facie* case of the unlawful purpose of sale, sufficient to convict him thereof; and, also, for unlawfully transporting the same. *State v. Simmons*, 183 N. C. 684, 110 S. E. 591.

**Same—Burden of Proof.**—The possession of the specified quantity of spirituous liquor sufficient to make out *prima facie* evidence of an unlawful purpose is only sufficient to sustain a verdict of guilty, and does not shift the burden upon the defendant to show his innocence, and an instruction to that effect is reversible error. *State v. Helms*, 181 N. C. 566, 107 S. E. 228.

Where the possession of the specified quantities of intoxicating liquors under our statute, C. S., 3385, has made out *prima facie* evidence of guilt, and the defendant has not introduced evidence, an instruction to the jury placing the burden on the defendant to establish his innocence is reversible error, being equivalent to directing a verdict, which is not permissible in a criminal case. *State v. Helms*, 181 N. C. 566, 107 S. E. 228.

**Necessity for Search Warrant.**—Where the *prima facie* case of unlawful sale of spirituous liquor arises from the possession, its capture by the officers is not illegal, and its being given to the jury for them to taste and smell, in corroboration of the other evidence, is not erroneous; and the liquor being the *corpus delicti*, such evidence would be competent had it been unlawfully seized, or in the illegal possession of the officers. *State v. Simmons*, 183 N. C. 684, 110 S. E. 591.

The defendant was seen entering with a suit-case the house of another and when followed by officers he endeavored to escape, and eight quarts of liquor were discovered in the suit-case. Under such circumstances a search warrant was unnecessary. *State v. Simmons*, 183 N. C. 684, 685, 110 S. E. 591.

**Effect of Turlington Act.**—The Turlington Act repeals all conflicting laws and makes the possession of any intoxicating liquors for the purpose of sale unlawful, unless such liquors are for the private use and in the residence of the possessor: Held, our prior statute making the possession of more than one gallon thereof *prima facie* evidence of the purpose of unlawful sale is not in conflict therewith or repealed thereby. *State v. Foster*, 185 N. C. 674, 116 S. E. 561. Applied in *State v. Potter*, 185 N. C. 742, 117 S. E. 504.

## § 3383. Indictment and proof.

**In General.**—The validity of an indictment for the unlawful sale of intoxicating liquors does not depend upon a charge of a sale to any particular person or to persons unknown. *State v. Lemons*, 182 N. C. 828, 109 S. E. 27. See notes of this case under section 4625.

**General Bad Reputation.**—Where there is substantive evidence tending to show the guilt of the defendant in having spirituous liquor for sale in violation of C. S., 3378, and his defense, supported by his evidence, is that some one else had taken the jugs and bottles of whisky to his home in his absence, without his knowledge, where the officer had found them, the general bad reputation of the defendant for unlawfully selling whisky may

be shown as a circumstance in corroboration of other evidence tending to show guilt. *State v. McNeill*, 182 N. C. 855, 109 S. E. 84.

Upon the criminal trial for having in possession spirituous liquors for the purposes of sale, C. S., 3379, and for unlawfully receiving more than one quart within fifteen consecutive days, C. S., 3385, evidence of the reputation of the defendant's place as being bad for selling liquor is unauthorized by this section, and it is purely hearsay and incompetent; and testimony of this character, admitted on the trial over the defendant's objection, and submitted in the charge as an independent circumstance to show guilt, under defendant's exceptions, constitutes reversible error. *State v. Springs*, 184 N. C. 768, 114 S. E. 851.

#### ART. 5. DELIVERY AND RECEIVING REGULATED

### § 3384. Amount delivered restricted.

**Liquor on Person.**—Where the defendant has been arrested for violating our prohibition law, and at his own request he is not searched, but voluntarily produces five pints of spirituous liquor concealed in different places on person, before the committing magistrate, the question of search and seizure without a warrant and the Federal constitutional question predicated thereon does not arise; and he may be convicted under this section by the provisions of C. S., 4548, relating to an arrest without a warrant for offenses committed in the presence of the officer, etc. *State v. Campbell*, 182 N. C. 911, 110 S. E. 86.

**The IVth and Vth Amendments to the Federal Constitution** are limitations upon the Federal Government and do not affect the validity of C. S., 3385, making unlawful the possession of more than one quart of spirituous liquor, or this section making the carrying and delivery thereof unlawful. *State v. Campbell*, 182 N. C. 911, 110 S. E. 86.

### § 3385. Amount received restricted.

See note to preceding section.

**Unlawful Purpose Essential.**—The unlawful purpose of sale of spirituous liquors is the offense made indictable by our statutes, whether the indictment be under this section or 3386, and not the possession thereof, for lawful purposes, though the possession of the specified quantities is prima facie evidence of the illegal purpose, and does not establish a prima facie case of guilt. *State v. Helms*, 181 N. C. 566, 107 S. E. 228.

**Effect of § 3379.**—Where the judge has withdrawn from the consideration of the jury of the question of prima facie guilt of violating the statute from the possession of more than one gallon of spirituous liquor, C. S., 3379, a conviction under this section in having more than one quart thereof in possession, will be sustained when supported by competent evidence. *State v. Campbell*, 182 N. C. 911, 110 S. E. 86.

**Federal Statutes Not in Conflict.**—This section is to prohibit the receiving of more than specified quantities of spirituous or malt liquors, and is an aid to the enforcement of the Volstead Act, passed in pursuance of the Eighteenth Amendment to the Constitution of the United States; and the Federal amendment giving concurrent jurisdiction to the Federal and state courts in the enforcement of the prohibition law, does not take from that of the state court the enforcement of a state statute on the subject not in conflict with the Federal statute, whether the state statute was passed before or after the amendment to the Federal Constitution. *State v. Brame*, 185 N. C. 631, 116 S. E. 164.

**Same—Volstead Act Not Applicable.**—The Volstead Act, title 2, § 25, has no application to an action in the State Court wherein the possession of specified quantities of intoxicating liquors under our statutes, makes



out prima facie evidence of guilt, and an instruction that it made a prima facie case sufficient to place the burden on the defendant to establish his innocence is reversible error. *State v. Helms*, 181 N. C. 566, 107 S. E. 228.

**Evidence Sufficient to Sustain Verdict.**—Evidence that half a gallon of whisky, in a fruit jar, and one pint thereof, in a bottle, were found concealed in defendant's overcoat, hanging in his store, and of his breaking the jug and bottle in the officer's presence and saying, "Damn it, if I can't drink it, I guess you won't get to drink it either," is sufficient to sustain a verdict that the defendant was guilty of receiving more than one quart of spirituous liquor at one time, or in a single container or package, as prohibited by this section. *State v. Bradshaw*, 184 N. C. 680, 114 S. E. 161.

Considering the language of this section with the history of legislation relating to prohibition, it is held that its controlling intent and purpose is to make it unlawful for any person to acquire and take into his possession within the State at any one time or in any one package, spirituous or vinous liquors, etc., in a quantity greater than one quart, without restricting the meaning of the word "receive" to "accepting from another"; and evidence tending to show that the defendant had walked straight to the place where the prohibited quantity was concealed and taken it from its hiding place, is sufficient to show that he knew it had been hidden there for his benefit, and sustain a conviction. *State v. Snipes*, 185 N. C. 743, 117 S. E. 500.

**Reputation of Defendant's Place.**—Upon the criminal trial for having in possession spirituous liquor for the purposes of sale, C. S., 3379, and for unlawfully receiving more than one quart within fifteen consecutive days, under the provisions of this section, evidence of the reputation of the defendant's place as being bad for selling liquor is unauthorized by statute, C. S., 3383, and it is purely hearsay and incompetent and testimony of this character, admitted on the trial over the defendant's objection, and submitted in the charge as an independent circumstance to show guilt, under defendant's exception, constitutes reversible error. *State v. Springs*, 184 N. C. 786, 114 S. E. 851.

**Sufficiency of Verdict.**—Where the defendant is tried for violating our prohibition law, and indicted under the provisions of C. S., 3379, with possession of spirituous liquor for purposes of sale; this section, with receiving more than a designated quantity; section 3386, with receiving such liquor more than one quart at a time within fifteen consecutive days; section 3384, with shipping and transporting the same, a verdict upon the evidence "that the defendant is guilty of receiving more liquor than allowed by law, and not guilty of receiving and transporting liquor," is a finding of guilty of violating the provisions of this section; and defendant's motion to set aside the verdict as unresponsive to the issues or the counts set out in the bill of indictment, is properly denied. *State v. Brame*, 185 N. C. 631, 116 S. E. 164.

## § 3386. Fifteen days between receipts.

See notes to Art. I, § 11, and § 3385.

**Verdict Not Responsive to Issues.**—Where the defendant, tried for violating our State prohibition law, has not been indicted under the provisions of this section for receiving within fifteen consecutive days in this State liquors in quantity or quantities totaling more than one quart, but the trial has been proceeded with under other counts, his exception to the court's refusal to set aside a verdict of conviction under this section and to the judgment accordingly entered, is sufficient to bring up the case to the Supreme Court for review; and his brief addressed to the insufficiency of the verdict, citing authorities, is a compliance with Supreme Court rules in that respect. *State v. Snipes*, 185 N. C. 743, 117 S. E. 500.

**Same—Unconstitutional.**—Counts in an indictment charging the defendant with violating our prohibition law, first, having liquor in his possession

for the purpose of sale; second, with receiving within the State a quantity greater than one quart; third, receiving within the State a package of spirituous liquor in a quantity greater than one quart, do not charge the offense prohibited by this section making it unlawful for any person during the space of fifteen consecutive days to receive such liquors in a quantity or quantities totaling more than one quart; and a verdict under the counts in this indictment of guilty of receiving more than one quart of whiskey in fifteen days is not responsive to the issues, and is a conviction of an offense of which the defendant was not tried, and concerning which a former conviction may not be successfully maintained, and is in contravention of Art. II, secs. 11 and 12, of our State Constitution. *State v. Snipes*, 185 N. C. 743, 117 S. E. 500.

#### ART. 6. SEIZURE AND FORFEITURE OF PROPERTY

##### § 3401. Fee for seizure.

For every distillery seized [copper still seized and destroyed] under this article the sheriff or other police officer shall receive the sum of twenty dollars, which shall be allowed by the commissioners of the county in which the seizure is made: *Provided*, that the commissioners shall not pay this amount if they are satisfied, after due investigation, that the seizure of the distillery was not bona fide made. [The words in brackets shall apply to Surrey county only.] (1909, c. 807, s. 3; 1911, c. 45, s. 1; 1925, c. 173.)

##### § 3403. Seizure of vehicle used in conveying liquor.

**Strict Construction.**—The principle requiring a strict construction of a statute creating a forfeiture or in derogation of a common-law right applies to this section, requiring a seizure and sale of the defendant's right, title, or interest in an automobile unlawfully used in liquor traffic, and such seizure may not be extended by implication to apply to the seizure of an automobile, owned exclusively by some person other than the defendant, and who is innocent of the offense or complicity therein. *State v. Johnson*, 181 N. C. 638, 107 S. E. 433.

**Only Defendant's Interest Forfeited.**—Under the provisions of this statute, the automobile or property itself is not condemned and forfeited, but only the right, title, and interest of the defendant in and to the property so seized. *State v. Johnson*, 181 N. C. 638, 641, 107 S. E. 433.

**Innocent Owner.**—Where the driver of an automobile has been indicted for the unlawful use of the owner's automobile in the liquor traffic, and the owner himself establishes his innocence of the offense, upon interpleader, the statute, (this section) does not deprive him of title to the machine exclusively owned by him, and a conviction would have the effect of condemning him of committing the offense without affording him a trial thereof. *State v. Johnson*, 181 N. C. 638, 107 S. E. 433.

**Same—Responsibility for Drivers.**—Where the owner of automobiles for hire has instructed his drivers not to use them in connection with the traffic in spirituous liquors, and one of them, without his knowledge, has disobeyed the order, the doctrine of *qui fecit per alium*, or *respondet superior*, does not apply, and he may intervene, where the driver is alone tried and convicted, and regain possession of the automobile and establish his title thereto. *State v. Johnson*, 181 N. C. 638, 107 S. E. 433.

**Innocent Mortgagee—Failure to Register Mortgage.**—This section creating a forfeiture of an automobile used in the unlawful transportation of intoxicating liquors, and providing for its sale, etc., by its express terms



relates only to the interest therein of the violator of the law upon his conviction, and cannot be extended by legal construction to include the interest of a mortgagee of the automobile who is entirely ignorant and innocent of the unlawful act of which the defendant has been convicted; nor will the failure of registration of the mortgage affect the matter under our registration laws enacted for the protection of creditors and purchases for a valuable consideration, etc. *South Georgia Motor Co. v. Jackson*, 184 N. C. 328, 114 S. E. 478.

In *South Georgia Motor Co. v. Jackson*, 184 N. C. 328, 331, 114 S. E. 478, the court said: It is contended that the Court's construction of the statute in *Skinner v. Thomas*, 171 N. C. 98, 103, 87 S. E. 976, (that this section does not affect the rights of innocent third person) affords such opportunity for collusion as will destroy the purpose of the law in its practical operation. But we cannot accept such possibility as a ground for extending the terms of the statute to cases not within the contemplation of the Legislature; it is our duty to declare the law, not to make it.

#### ART. 7. GENERAL PROVISIONS

### § 3406. No witness privileged.

**Testimony at Former Trial.**—Where a witness on a former trial for violating the prohibition law against the manufacture or sale of intoxicating liquor has voluntarily testified as to matters which may tend to incriminate him, claiming no exemption or immunity when called upon to testify thereto at the second trial, who were present and heard the testimony at the former one, the testimony not coming within the terms of this section. *State v. Burnett*, 184 N. C. 785, 115 S. E. 57.

### § 3407. Allowing distillery to be operated on land.

**Objection to a bill of indictment on account of duplicity** comes too late after verdict, and where it is to the charge of two separate offenses in the same bill, one under this section for unlawfully permitting a still to be set up for operation on the defendant's land; and the other for unlawfully manufacturing spirituous liquors, C. S., 3409, and there is sufficient evidence on the latter count, a judgment upon the verdict on that count will be sustained. *State v. Mundy*, 182 N. C. 907, 110 S. E. 93.

### § 3409. Manufacturing liquor a felony.

**Accessories Equally Guilty.**—The defendant, guilty of aiding and abetting the unlawful manufacture of liquor, is equally guilty with those who actually operated the still. *State v. Clark*, 183 N. C. 733, 110 S. E. 641.

The appellant, convicted on his trial of aiding or abetting in the manufacture of whiskey on one count of the indictment, under this section, may not complain because he was tried on another count of the same bill for the unlawful manufacture of liquor and acquitted, there being sufficient evidence to sustain a conviction on each one. *State v. Smith*, 183 N. C. 725, 110 S. E. 654.

**Presumption Regarding Previous Conviction.**—The first conviction of manufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. *State v. Clark*, 183 N. C. 733, 110 S. E. 641.

**Testimony of Wife or Near Relative.**—Where the defendant's wife or other near relatives have testified in his behalf on a trial for manufacturing, etc., liquor, in violation of our statute, this section, it is not error for the judge to charge the jury to receive their testimony with a degree

of caution, to closely scrutinize and scan it, because of their interest in the verdict, when followed by the instruction to give it the same credibility as that of a disinterested witness if they were satisfied of its truth. *State v. Smith*, 183 N. C. 725, 110 S. E. 654.

**Irrelevant Testimony.**—The rejection of evidence as to the quantity of cotton or corn the defendant, tried for the unlawful manufacture of liquor, etc., under this section, had raised on his farm that year, is of irrelevant testimony, and its exclusion not erroneous. *State v. Smith*, 183 N. C. 725, 110 S. E. 654.

**Evidence Sufficient for Conviction.**—Evidence upon the trial for the unlawful and wilful manufacture of whiskey and for aiding, assisting and abetting parties in the said manufacture, that when the officers, upon information received, raided the still there were several participants there who ran away, unidentified, but one of them dodged and ran back across a ditch and into a pond, making tracks in the mud, apparently those of tennis shoes, and that later in the night the defendant was met by the officers in a road near his home with his clothes wet and wearing wet tennis shoes, and having a "testing vial" of the whiskey, etc., is sufficient to sustain a verdict of conviction. *State v. Smith*, 183 N. C. 725, 110 S. E. 564.

Where there is circumstantial evidence tending to show that the defendant had free access to the cellar in a house in the country where spiritous liquor was unlawfully manufactured, and was present at the time, and that he carried whiskey in cans from thence to a place of business he had in a nearby city, and had brought several persons out from the city, etc., it is sufficient for conviction under a count in the indictment charging the unlawful manufacture of intoxicants; and where the jury have rendered a verdict of guilty upon an issue as to aiding and abetting therein, though no such offense was specifically charged, he would be equally guilty with those who had actually done the illicit manufacturing, and a motion as of nonsuit was properly disallowed. *State v. Grier*, 184 N. C. 723, 114 S. E. 622.

A conviction of several defendants upon wholly circumstantial evidence tending to show that they had a common purpose in illicit distilling of spiritous liquor in a close neighborhood to each other, upon adjoining premises, and receiving a common benefit, may be had, as in this case, where there was evidence that they had moved stills from one place to the other on their lands, to conceal their operations, used the still shops for the feeding of their hogs, with other circumstantial evidence tending to show the joint and unlawful manufacture of the liquor, and identifying them therewith. *State v. McMillan*, 180 N. C. 741, 105 S. E. 403.

## § 3411. Local laws not repealed.

**Purpose of Legislature.**—This section evinces the manifest purpose of the Legislature to continue in full force and effect all existing local or special statutes relating to the manufacture and sale of liquor, except where otherwise provided by law. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57.

## ART. 8. NATIONAL LIQUOR LAW, CONFORMATION OF STATE LAW

### § 3411 (b). Manufacture, sale, etc., forbidden; construction of law; non-beverage liquor.

See note to § 4622.

**Separate Offenses Charged in Same Warrant.**—The offenses of delivering, and of keeping for sale, are separate offenses under this act and although charged in the same warrant, they will be treated as separate counts. *State v. Janett*, 189 N. C. 516, 127 S. E. 590.



**General Verdict Sufficient for Conviction.**—A general verdict of guilty, under evidence tending to show that the defendant unlawfully had in his possession, when not in his private dwelling, intoxicating liquor, under an indictment therefor, as well as for the unlawful receiving and transportation, is sufficient to sustain a conviction upon the count of possession prohibited under the provisions of the Turlington Act, ch. 1, secs. 2 and 10, Laws 1923. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739.

**Same—Erroneous Charge as to Separate Count Harmless.**—Where a general verdict of guilty has been rendered against the defendant, upon competent evidence, tending to show that he unlawfully had spirituous liquor in his possession, contrary to the provisions of the Turlington Act, an erroneous charge as to receiving and transporting it, is harmless error. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739.

**Sentence of Two Years Constitutional.**—A sentence of two years for violating the Turlington Act will not be held as inhibited by our State Constitution as cruel and unusual, by reason of the fact that the judge after the trial and before sentence, made inquiry into the character of the defendant, the sentence imposed being in conformity with the provisions of the statute. Constitution, Art. I, sec. 14. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258.

**Evidence Sufficient to Convict.**—This section of the Turlington Act, was expressly to be liberally construed to prevent intoxication, and makes it unlawful for one to possess intoxicating liquor, with restricted qualifications; and a conviction will be sustained under a verdict of guilty upon evidence tending to show that the defendant received a bottle of intoxicating liquor from another, took a drink therefrom, and handed the bottle back to the one from whom he had received it, neither of them being upon his own premises; and an instruction to find the defendant guilty under these circumstances, if proved beyond a reasonable doubt, is not erroneous. *State v. McAllister*, 187 N. C. 400, 121 S. E. 739.

### § 3411 (f). Seizure of liquor or conveyance; arrests; sale of property.

**Constitutionality.**—The provisions of the Turlington Act, Public Laws of 1923, permitting the seizure of intoxicating liquor being unlawfully transported and of the conveyance in which it is being done, when the officer sees or has absolute knowledge that there is intoxicating liquor in such vehicle, do not contravene the provisions of the State Constitution, Art. I, secs. 11 and 15. *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

**When Right to Arrest without Warrant.**—Where there is evidence that acting upon information previously received that intoxicating liquors are being unlawfully transported, the proper officers of the law lie in wait for and follow automobiles, and can see containers and smell the liquor, they have a right to arrest without warrant and seize the vehicle. *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

**Same—Evidence Not Excluded.**—The arrest by the officer of the law of the defendant without a warrant, while unlawfully transporting intoxicating liquor, being valid under the provisions of our statute, it may not successfully be maintained that evidence thereof should have been excluded, and that upon a trial for unlawfully transporting liquors under the Turlington Act, his motion for nonsuit upon the evidence found therein should have been granted. *State v. Godette*, 188 N. C. 497, 125 S. E. 24.

### § 3411 (j). Possession prima facie evidence of keeping for sale.

**Section 3379 Not Repealed.**—The recent Turlington Act repeals all conflicting laws and makes the possession of any intoxicating liquors for the purpose of sale unlawful, unless such liquors are for the private

use and in the residence of the possessor: Held, our prior statute making the possession of more than one gallon thereof prima facie evidence of the purpose of unlawful sale is not in conflict therewith or repealed thereby. *State v. Foster*, 185 N. C. 674, 116 S. E. 561.

**Defendant Must Plead and Show Possession for Proper Purposes.**—Where the defendant, charged with the violation of our prohibition law, seeks to defend himself under the provisions of the Turlington Act, allowing the possession of intoxicating liquors in his house for his own purposes, he must plead and show that the liquor was for the purpose allowed by the act. *State v. Foster*, 185 N. C. 674, 116 S. E. 561.

## CHAPTER 67

### RAILROADS AND OTHER CARRIERS

#### ART. 4. TOWNSHIP SUBSCRIPTIONS IN AID OF RAILROADS

##### § 3443 (a). Increase of interest; procedure.

Whenever the board of county commissioners of any county has subscribed for the use and benefit of any township to any interest in any railroad or railroad corporation, as provided in said article, and the majority of the proxies chosen to represent the stock or interest of the township in such railroad shall certify to the board of commissioners that in their opinion the interest of the township in said railroad or railroad corporation should be increased, the board of county commissioners shall order an election to be held in such township, upon the petition of one-fourth of the qualified voters of such township, in the same manner as provided in said article and chapter, and if the majority of the qualified voters of such township shall vote in favor of the proposition contained in the petition, the county commissioners shall execute and deliver the bonds authorized, levy and collect in the township and dispose of the tax, as authorized in said article four, chapter sixty-seven of the Consolidated Statutes. (1924, c. 117, s. 1.)

##### § 3443 (b). Execution and sale of bonds for increase of interest.

Said bonds shall be executed by the chairman of the board of county commissioners of such county, attested by the clerk of said board, who shall affix the seal of the board, and deliver the same to the board of proxies representing said township.

The board of proxies shall advertise said bonds as provided by law, and faithfully apply the same to the purposes set forth in the petition for the election. (1924, c. 117, s. 2.)

##### § 3443 (c). Organization of proxies; report; vacancies.

The proxies chosen at each general election shall qualify and organize on the first Mondays in December, elect a chairman, vice-chairman and secretary, and they shall annually in each year file with the board of county commissioners a copy of the report re-



quired by law to be made to the Interstate Commerce Commission.

Any vacancy occurring in the board of proxies shall be filled by the board of proxies until the next general election. (1924, c. 117, s. 4.)

#### ART. 5. POWERS AND LIABILITIES

### § 3444 (a). Engaging in unauthorized business.

It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

Any railroad company violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in the discretion of the court. (1924, c. 80.)

#### ART. 7. LIABILITY OF RAILROADS FOR INJURIES TO EMPLOYEES

### § 3466. Injuries through fellow servants or defective appliances.

**Evidence Raising Issue for Jury.**—In an action by the administrator of a deceased employee of an electric railway company to recover for his intestate's negligent death, the fact that it was caused by a head-on collision on defendant railroad company's trestle, in broad daylight, with another of its cars, is some evidence that the defendant's actionable and continuing negligence proximately caused the employee's death, and, under the doctrine of *res ipsa loquitur*, raises the issue for the determination of the jury as to whether the defendant's negligence proximately caused the death, though the intestate's contributory negligence may also have been one of the proximate causes thereof. *Hinnant v. Tidewater Power Co.*, 187 N. C. 288, 121 S. E. 540.

### § 3467. Contributory negligence no bar, but mitigates damages.

**In General.**—The doctrine of comparative negligence is only recognized by our courts in instances coming within the meaning of the Federal Employers' Liability Act, and this section, and then only for the purpose of mitigating the damages or as a partial defense. *Moore v. Chicago Bridge, etc., Works*, 183 N. C. 438, 111 S. E. 776.

Contributory negligence is not a complete bar to the recovery of damages by an employee of a railroad company caused by the latter in interstate commerce, in an action brought under the Federal Employers' Liability Act, the admeasurement being that of comparative negligence by which the jury, under conflicting evidence, reduces the recovery in accordance with the relative negligence of the employee. *Cobia v. Atlantic Coast Line R. Co.*, 188 N. C. 487, 125 S. E. 18; *Hinnant v. Tidewater Power Co.*, 187 N. C. 288, 121 S. E. 540; *Ballew v. Asheville, etc., R. Co.*, 186 N. C. 704, 120 S. E. 334; *Moore v. Atlantic Coast Line R. Co.*, 185 N. C. 189, 116 S. E. 409.

**Application.**—In an action to recover damages of a railroad company for negligent injury caused to its employee, there was evidence tending to show that plaintiff, while performing his duty as a switchman, coupled a car attached to defendant's locomotive, while not in motion, and the injury was caused by the sudden movement of the locomotive by the engineer, without a signal from the plaintiff, contrary to custom or prac-

tice, and crushed the plaintiff's foot between the bumpers on the cars, causing the injury complained of: Held, though there was evidence of contributory negligence, its establishment would not be complete defense, under provisions of our recent statute, this section, applying the principle of comparative negligence in such cases; and upon a motion to nonsuit, evidence that the engineer properly acted on the signal of another employee will not be considered. *Lamm v. Atlantic Coast Line R. Co.*, 183 N. C. 74, 110 S. E. 659.

**Effect of Intent.**—The plaintiff's contributory negligence will not bar his recovery of damages in his action when the defendant has inflicted the injury with either actual or constructive intent, but it is otherwise if it is admitted that he had not this intent, and his contributory negligence will bar his recovery. *Ballew v. Asheville, etc., R. Co.*, 186 N. C. 704, 120 S. E. 334.

**Contributory Negligence Question for Jury.**—This being an intrastate matter, under this section, the plaintiff was entitled to have his cause submitted to the jury, for, as therein provided, contributory negligence being no longer a bar to an action by an employee against the railroad for injuries sustained during his employment and the assumption of risk were for the jury, the burden of proof being upon the defendant. *Hines v. Atlantic Coast Line R. Co.*, 185 N. C. 72, 75, 116 S. E. 175.

## § 3468. Assumption of risk as defense.

**Question for Jury.**—Where there is evidence that the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish him a truck proper for the service, the use of which would have avoided the injury, it is for the jury to determine whether the defendant was negligent in failing to supply the truck, or whether the plaintiff assumed the risk in attempting to lift the trunk, under the circumstances, or whether these were the proximate causes of the injury. *Hines v. Atlantic Coast Line R. Co.*, 185 N. C. 72, 116 S. E. 175.

## ART. 8. CONSTRUCTION AND OPERATION OF RAILROADS

### § 3480. Operation of trains on Sunday misdemeanor; exceptions.

**Constitutionality.**—The setting aside of Sunday as a day of rest and quiet is not a religious, but a police regulation, necessary to the health and welfare of the people, and it applies to railroads, including logging roads, by this section, to the employees therein engaged; and the provisions of our Constitution requiring religious liberty have no application. *State v. Suncrest Lumber Co.*, 186 N. C. 122, 118 S. E. 882.

**A lumber railroad**, over which steam locomotives haul logs, comes within the provisions of this section, making it a misdemeanor for railroads to permit the operation of trains, etc., on Sunday, whether it transports freight or passengers, for hire or otherwise, and it is immaterial whether it was for the sole purpose of supplying its extensive lumber manufacturing plants on Monday. *State v. Suncrest Lumber Co.*, 186 N. C. 122, 118 S. E. 882.

## ART. 10. CARRIAGE OF PASSENGERS

### § 3508. Beating way on trains misdemeanor; venue.

**Effect on Liability of Insurance Co.**—A policy of accident insurance that excepts from the company's full liability diseases contracted before the date of the policy, "nor for sickness due to immorality or the viola-



tion of law," does not of itself exclude such liability for an injury caused by the plaintiff's stealing a ride on a railway train, made a misdemeanor by this section, unless the plaintiff's act was so reckless as to withdraw it from the class of accidents covered by the policy. *Poole v. Imperial Life, etc., Co.*, 188 N. C. 468, 125 S. E. 8.

## ART. 11. CARRIAGE OF FREIGHT

### § 3516. Penalty for failure to transport within reasonable time.

**Negligent Default in Delivery.**—The penalty imposed upon a carrier for unreasonable delay in transportation of goods, was judicially determined not to apply to delivery under the provisions of Revisal (1905), sec. 2632, and hence a subsequent amendment by the Laws of 1907, that such delay shall not be construed as referring to delay in starting the shipment, but shall apply also to "its delivery at its destination within the time specified," with the further provision that the carrier shall be relieved from the penalty if it is established to the satisfaction of the justice of the peace or the jury, that the delay was incident to causes that could not be foreseen in the exercise of ordinary care, it was held, that this section, in which these statutes are brought forward, extends the penalty to cases of negligent default in the carrier's making delivery of the freight to the consignee. *Mitchell v. Atlantic Coast Line R. Co.*, 183 N. C. 162, 110 S. E. 859.

**Duty to Notify Consignee.**—Where a shipment of goods is delivered to a railroad company for transportation, the title vests in the consignee, with the duty resting upon the carrier on the arrival of the goods at destination to notify the consignee and make delivery or show legal excuse for its default. And this principle applies to a side-station when notification of arrival should have been given from a nearby station, and the inquiring consignee was there misinformed as to the arrival, and the car in the meanwhile was broken into and the shipment stolen. *Acme Mfg. Co. v. Tucker*, 183 N. C. 303, 111 S. E. 525.

**Verdict Incomplete.**—Where it is established by the jury that a consignment of goods was carried to the delivering point by the carrier, its failure to deliver to the consignee, or to notify him, and the goods are lost while in its possession, the verdict is incomplete when there was no issue submitted as to whether the carrier, who is a party to the action, was in default in not delivering it to the consignee, and a judgment thereon against the consignee is reversible error, entitling the consignee to a new trial. *Acme Mfg. Co. v. Tucker*, 183 N. C. 303, 111 S. E. 303, 525.

**Sufficiency of Evidence on Motion for Nonsuit.**—In an action for the penalty prescribed for the unreasonable transmission and delay in the delivery of goods by the carrier, there was evidence that a shipment of various articles was transported by the carrier to destination, and all were received by the consignee, except one of them, which was missing, and remained in the carrier's warehouse beyond the statutory reasonable time: Held, sufficient upon the question of the carrier's liability for the penalty, and a motion as of nonsuit, and a prayer for instruction directing a verdict on the evidence for defendant, were properly refused. *Wall v. R. R.*, 147 N. C. 407, cited and distinguished. *Mitchell v. Atlantic Coast Line R. Co.*, 183 N. C. 162, 110 S. E. 859.

### § 3524. Claims for loss of or damage to goods; filing and adjustment.

**What Filing Sufficient.**—The penalty imposed by this section, on the carrier to pay a claim for damages, etc., within ninety days after the filing of the claim by the consignee with carrier's agent at the terminal point, etc., is to enforce obedience to the mandate of the law by punish-

ment of the carrier, and the statute must be strictly construed, requiring the consignee to bring his case clearly within its language and meaning; and in order to recover the penalty, the consignee must file his claim with the agent, as the statute directs, and the filing thereof with another of the carrier's agents is insufficient. *Eagles Co. v. East Carolina Railway*, 184 N. C. 66, 113 S. E. 512.

Under the terms of this section, imposing, in favor of the consignee, a penalty upon the carrier for loss of or damage to goods while in its possession, if not paid, "within ninety days after the filing of such claim by the consignee with the carrier's agent at the point of destination or at the point of delivery to another carrier," it was held, that the filing is sufficient if delivered to the designated agent for that purpose, and so received by him. *Eagles Co. v. East Carolina Railway*, 184 N. C. 66, 113 S. E. 512.

**Same—By Mail.**—The essential things for the proper filing of the claim against the common carrier for damages, and for the penalty under the provisions of this section, being its delivery to and acceptance by the carrier's designated agent, such filing is not restricted to its manual delivery, but the same may be done through the agency of the United States mail. *Eagles Co. v. East Carolina Railway*, 184 N. C. 66, 113 S. E. 512.

Where the consignee properly addresses, stamps, and mails his claim for such loss or damage at a postoffice of the United States Government, it will be presumed that it was delivered, as addressed, in the usual course of the mails, and a denial of delivery by the carrier raises a conflict of evidence thereon for the determination of the jury, and the carrier's motion as of nonsuit is properly denied. *Eagles Co. v. East Carolina Railway*, 184 N. C. 66, 113 S. E. 512.

**Issues Separate and Distinct.**—In an action against a railroad company to recover damages to a shipment of goods and the penalty for the failure of defendant to pay the same within 90 days, as allowed by this section, the issues raised are entirely separate and distinct from each other, and the trial judge may set aside the verdict on the second issue, and retain that on the first one, for a retrial. *Hussey v. Atlantic Coast Line R. Co.*, 183 N. C. 7, 110 S. E. 599.

In the plaintiff's action to recover damages against a railroad company to a shipment of goods and a penalty for the failure of the defendant to pay the claim for 90 days, as required by this section, and the evidence tends only to sustain the plaintiff's demand, on both issues, the judge may retain the verdict on the issue of damages answered in plaintiff's favor, set aside the verdict on the second issue denying recovery of the penalty, and on the retrial of the second issue direct a verdict thereupon, on the same evidence, in plaintiff's favor. *Semble*, the court could have so answered this issue as a matter of law on the first trial. *Hussey v. Atlantic Coast Line R. Co.*, 183 N. C. 7, 110 S. E. 599.

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## CHAPTER 70

### ROADS AND HIGHWAYS

#### ART. 1. STATE HIGHWAY COMMISSION AND STATE HIGHWAY FUND

#### § 3573. Commission established.

**Suit against Commission.**—The statutes creating the State Highway Commission enumerate their powers and duties in the construction, maintenance, etc., of highways for public benefit, without either expressly or



impliedly giving it the right to sue and be sued, but manifestly as an agency of the State for the purpose of exercising administrative and governmental functions. Public Laws 1915, ch. 113; Public Laws 1919, ch. 189; Public Laws 1921, ch. 2, sec. 10. *Carpenter v. Atlanta, etc., Ry. Co.*, 184 N. C. 400, 114 S. E. 693.

The principle upon which a governmental agency is not liable to an action in tort committed by its agents, rests upon public policy, and the State Highway Commission being a governmental agency, is immune from suits of this character, whether empowered by the statutes concerning it to sue and be sued or otherwise, there being no statute or constitutional provision authorizing it. *Carpenter v. Atlanta, etc., Ry. Co.*, 184 N. C. 400, 114 S. E. 693.

The plaintiff in this action sued the State Highway Commission for damages for the death of his intestate, alleged to have been caused by its failure to provide a safe place for the intestate to work in pursuance of his dangerous duties as defendant's employee, it was held that, a demurrer confined the scope of the inquiry to whether the action could be maintained against the defendant commission, in its capacity in which it was sued, if regarded as a general appearance, and was properly sustained. *Carpenter v. Atlanta, etc., R. Co.*, 184 N. C. 400, 114 S. E. 693.

A summons served on the chairman alone, and as such of the State Highway Commission, does not present in the action the question of the individual liability of its agents or employees for a tort alleged to have been committed by them. *Carpenter v. Atlanta, etc., R. Co.*, 184 N. C. 400, 114 S. E. 693.

#### ART 4. GENERAL ROAD IMPROVEMENT; ROAD COMMISSIONS; BONDS AND TAXES

### § 3667. Assessments of damages and benefits.

**Location of Road Not Considered.**—Where a part of the owner's lands has been taken by the county in straightening a highway, and he is left with the use of the old road running near his dwelling on another part of his land, he is not entitled to having considered by the jury, in estimating his damages, the fact that the new road did not run by his dwelling, the location of the new part of the road being a matter entirely within the discretion of the proper county authorities. *Elks v. Commissioners*, 179 N. C. 241, 102 S. E. 414.

### § 3671 (a). Drainage of highway; application to court; summons; commissioners.

Whenever in the establishment, construction, improvement or maintenance of any public highway it shall be necessary to drain said highway, and to accomplish such purpose it becomes necessary to excavate a canal or canals for carrying the surplus water to some appropriate outlet, either along the right-of-way of said highway or across the lands of other landowners, and by the construction, enlargement or improvement of such canal or canals, lands other than said highway will be drained and benefited, then, and in such event, the State highway commission, if said highway be a part of the State highway system, or the county highway commission, or such agency in the county as may have jurisdiction over public highways, if said highway be a county highway, may, by petition, apply to the Superior Court of the county in which, in whole or in part, said highway lies or said canal is to be constructed, setting forth the necessity for the construction, improvement or maintenance of

said canal, the lands which will be drained thereby, with such particularity as to enable same to be identified, the names of the owners of said land and the particular circumstances of the case; whereupon a summons shall be issued for and served upon each of the proprietors, requiring them to appear before the court at a time to be named in the summons, which shall not be less than ten days from the service thereof, and upon such day the petition shall be heard, and the court shall appoint three disinterested persons, one of whom shall be a competent civil and drainage engineer recommended by the State Geologist, and the other two of whom shall be resident freeholders of the county or counties in which the road and lands are, in whole or in part located, as commissioners, who shall, before entering upon the discharge of their duties, be sworn to do justice between the parties. (1925, c. 85, s. 3.)

#### **§ 3671 (b). View by commissioners; report; judgment.**

The commissioners, or a majority of them, one of whom must be the engineer aforesaid, shall, on a day which each party is to be notified at least five days in advance, meet on the premises, and view the highway, or proposed highway, and also the lands which may be drained by the proposed canal, and shall determine and report what lands will be drained and benefited by the construction, enlargement or improvement of such canal, and whether said drainage ought to be done exclusively by said highway authorities, and if they are of opinion that the same ought not to be drained exclusively at their expense, then they shall decide and determine the route of the canal, the dimensions and charter thereof, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, the extent, area and identity of lands which shall be permitted to drain therein, and providing as far as possible for the effectual drainage of said highway, and the protection and benefit of the lands of all the parties; and they shall apportion the cost of the construction, repair and maintenance of said canal among said highway authorities and said landowners, and report the same to the court, which when confirmed by the clerk shall stand as a judgment of the court against each of the parties, his or its executors, administrators, heirs, assigns or successors. (1925, c. 85, s. 4.)

#### **§ 3671 (c). Appeal.**

Upon the entry of the judgment or decree aforesaid the parties to said action, or any of them, shall have the right to appeal to the Superior Court in term time under the same rules and regulations as apply to other special proceedings. (1925, c. 85, s. 5.)

#### **§ 3671 (d). Rights of parties.**

The parties to such special proceeding shall have all the rights which are secured to similar parties by article one of chapter ninety-four of the Consolidated Statutes, and shall be regulated by the



provisions thereof and amendments thereto, in so far as the same are not inconsistent herewith. (1925, c. 85, s. 6.)

### **§ 3671 (e). Closing road during construction.**

If it shall appear necessary to the road governing body of any county, its officers or appropriate employees, to close any road or highway coming under its jurisdiction so as to permit of proper completion of work which is being performed, such road governing body, its officers or employees, may close or cause to be closed the whole or any portion of such road or highway deemed necessary to be excluded from public travel. While any such road or highway, or portion thereof, if so closed, or while any such road or highway, or portion thereof, is in process of construction or maintenance, such road governing body, its officers or appropriate employees, or its contractor, under authority from such road governing body, may erect, or cause to be erected, suitable barriers or obstructions thereon, may post, or cause to be posted, conspicuous notices to the effect that the road or highway, or portion thereof, is closed, warning signs, lights and lanterns on such road or highway, or portions thereof. When such road or highway is closed to the public or in process of construction or maintenance, as provided herein, any person who willfully breaks down, drives into new construction work, removes, injures, or destroys any such barrier or barriers or obstructions on road being constructed, or tears down, removes, or destroys any such notices, drives into new construction work, or extinguishes, removes, injures or destroys any such warning lights or lanterns so erected, posted, or placed, shall be guilty of a misdemeanor: *Provided*, a detour shall be provided when the road is closed. (1924, c. 81.)

## **ART. 6. COUNTY ROAD MAINTENANCE TAX**

### **§ 3718. Special tax for road maintenance authorized.**

**Local and General Acts Consistent.**—It was the intent and purpose of this section and sections 3719, 3720 and 3721, that the public roads of a township formed under the provisions of a special statute, with a road commission having charge of its public roads (ch. 84, Public-Local Laws 1919), to provide for the continued maintenance of the roads, and for the payment of interest on bonds issued for their construction, and held, under the statute applicable in this case the county commissioners can levy a special tax sufficient for such purposes, the local and the general act on the subject being consistent and their terms not repugnant to each other. *Road Commission v. Board of Commissioners*, 188 N. C. 362, 124 S. E. 743.

## **ART. 8. ROAD OFFICIALS**

### **§ 3750. Public roads designated; authority of supervisors and county commissioners.**

**Claims to Exemption from Working Road.**—Where a general statute this section, makes a justice of the peace one of the road supervisors of the county, and another general statute exempts him from road duty and

a later public-local law relating to a particular county repeals these special privileges by providing an entirely different method for the supervision and management of its highways, and requires all able-bodied men between certain ages to work the roads a designated number of days a year or pay a certain sum in lieu thereof, a justice of the peace or another—a mail carrier in this case—cannot claim to be exempt therefrom when he falls within the general class of persons required to do this public duty, without statutory expressions to that effect. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755.

**§ 3751. Local: County commissioners to regulate roads and bridges.**

The board of county commissioners shall have power, and it shall be their duty, to make rules and ordinances, not inconsistent with the acts of the general assembly, to regulate the use of the public roads, highways and bridges of their respective counties. They shall have power to make rules and ordinances to regulate the weight of loads permitted to be hauled on the public roads and highways, and as to the width of tires permitted to be used; and may prohibit the carrying thereon of such loads and the use of such tires or vehicles as they may deem needlessly injurious or destructive to such roads or bridges. In making such ordinances, they may have regard to the conditions of the various roads or parts thereof, and the conditions of traffic thereon, and make different rules and ordinances applicable thereto. Any person who shall needlessly violate an ordinance made in pursuance of the authority herein given, or who shall aid, abet or assist in such violation, shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

This section shall apply only to the counties of Alamance, Anson, Beaufort, Bertie, Brunswick, Camden, Cabarrus, Cherokee, Columbus, Cumberland, Davidson, Duplin, Durham, Franklin, Gaston, Granville, Guilford, Hertford, Hoke, Iredell, Johnston, Lee, Madison, McDowell, Macon, Montgomery, Nash, New Hanover, Northampton, Onslow, Pitt, Pasquotank, Randolph, Richmond, [Rockingham], Sampson, Tyress, Union, Warren, Washington, Yancey. (1915, c. 264, ss. 1, 2, 3; 1919, cc. 154, 209; Ex. Sess. 1920, c. 50; 1925, c. 224.)

**ART. 9. CONSTRUCTION AND MAINTENANCE OF ROADS AND BRIDGES**

**§ 3767. Erection and maintenance of roads and bridges; county-line bridges.**

**Constitutionality.**—The authority conferred by C. S., 3767-3772, upon the board of county commissioners to build, repair, or alter its road and bridges in any way that may seem practicable, and issue bonds or borrow money and issue notes not to exceed actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily inconsistent with the amendment to Article V, section 6, of our State Constitution, excepting from the limitation of 15 cents on the \$100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act," the amendment only adding that



the approval may be done by "general act." *Norfolk Southern Railroad Co. v. McArtan*, 185 N. C. 201, 116 S. E. 731.

The rule under which a new constitution is construed to supersede a prior constitution does not apply to an amendment which reenacts the former provisions with superadded powers, as in this case, the powers conferred upon the county commissioners to provide for the bridges on its highways, superadding the words that the approval of the Legislature may be by special or general statute. *Norfolk Southern Railroad Co. v. McArtan*, 185 N. C. 201, 116 S. E. 731.

**Validity of Notes Issued by County under General Provisions.**—Where, with special legislative authority, a board of county commissioners has contracted with the State Highway Commission to build a bridge on a public highway of the county, to be absorbed in the State's system of highways, and for the building of the bridge the county has incurred an indebtedness for which it has afterwards given its notes, exception to taxation levied to meet these notes upon the ground that it required a special act of the Legislature to give them validity is untenable when proceedings for the purpose have been had under the provisions of the general statutes. *Norfolk Southern Railroad Co. v. McArtan*, 185 N. C. 201, 116 S. E. 731.

## **§ 3768. Bonds for bridges; terms and denominations; no sale below par.**

**Implied Power to Issue Bonds.**—An act that abolishes two boards of road commissioners of a county and substitutes one central board for the entire county, authorizing it to take care of the indebtedness theretofore incurred for such purposes, and to incur obligations for the continuance of this work and to borrow money in pursuance thereof not to exceed a certain amount, is sufficient to imply the power to issue bonds by the new board to take care of this indebtedness incurred and to be incurred, at the rate of interest specified by the act, and to mature them within the forty years limited by this section. *Huneycutt v. Commissioners*, 182 N. C. 319, 109 S. E. 4. See notes of this case under Art. II, section 29.

### **ART. 10. REGULATIONS FOR ROADS AND BRIDGES**

## **§ 3789. Obstructing highways and roads misdemeanor.**

**Placing nails in the highway** in order to puncture automobile tires is an obstruction within this section. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248.

**Maximum Penalty Constitutional.**—Where a defendant is convicted of obstructing a highway and of wanton injury to personal property by the same act, it is not in violation of Art. V, § 14, nor otherwise improper, in view of § 4622, to sentence him to the maximum penalty for each offense. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248.

### **ART. 13. CARTWAYS, CHURCH ROADS, AND THE LIKE**

## **§ 3835. Road supervisors establish or discontinue cartways; number of jurors; appeal.**

**Editor's Note.**—For local modification applicable to Union County, see Acts 1925, c. 234.

## **§ 3836. Cartways and tramways laid out; procedure; cartways to be open to the public; appeal.**

**Editor's Note.**—For local modification applicable to Union County, see Act 1925, c. 234.

**"Necessary, Reasonable and Just."**—For the owner of lands, cultivat-

ing the same, to obtain a way of necessity over the lands of another to a public road, he must show that such way is "necessary, reasonable and just," under the provisions of this section; and where it appears, without sufficient denial, that there is a public road leading to the cultivated lands, the petition is properly dismissed. *Rhodes v. Shelton*, 187 N. C. 716, 122 S. E. 761.

**Special Local Law Applicable.**—While, under the provisions of our general statute, this section, a petitioner who already has an outlet from his lands to a public road, reasonably sufficient for the purpose, is not allowed to have an additional or different cartway established merely because a shorter and better route can be shown, it may be otherwise when the petitioner has proceeded under the provisions of a special local law applicable to a certain county allowing it under certain conditions, the provisions of the local law controlling those of the general statute on the subject. *Farmer v. Bright*, 183 N. C. 655, 112 S. E. 420.

Where, under the provisions of a public-local law, the commissioners of a county, etc., upon petition, may cause a private cartway over the lands of an adjoining owner to be established upon sufficient reason shown, it was held, that this section, is not applicable, and upon appeal by the petitioner from the refusal of the county commissioners to order the cartway made, it is error for the Superior Court judge to dismiss the action as of nonsuit upon the evidence, which, if accepted by the jury, would entitle the petitioner to have his cartway in accordance with the terms of the local statute applicable. *Farmer v. Bright*, 183 N. C. 655, 112 S. E. 420.

### **§ 3837. Discontinuance of cartways, etc.; gates and stockguards; duration of right.**

**Editor's Note.**—For local modification applicable to Union County, see Acts 1925, c. 234.

## **ART. 15. STATE HIGHWAY COMMISSION**

### **§ 3846 (a). General purposes of law; control, repair and maintenance of highways.**

**Editor's Note.**—As to the general policy of the state as to highway see *Young v. Board* (N. C.), 128 S. E. 401.

The purpose of the act of 1921 is to encourage cooperation between the highway commission and the county authorities. *Young v. Board* (N. C.), 128 S. E. 401.

**Agreements Between County and State Commissioners.** — The boards of county commissioners and the state highway commission are vested with powers to enter into contracts and agreements for the construction of roads forming a part of the state highway system. *Young v. Board*, (N. C.), 128 S. E. 401.

### **§ 3846 (c). Maximum mileage; routes and maps; objections; changes.**

**Effect on Powers Conferred in Section 3846(j).**—Construing the Public Laws of 1921, ch. 2, [3846(j)] creating a State Highway Commission to take over for the State, as therein provided, the highways or public roads, change, alter or construct them so as to form a State-wide system, connected with such systems of other states, it was held, that section 10, giving the commission broad and comprehensive discretionary powers in the adoption of routes, should be construed in *pari materia* with this section thereof, the latter limiting the discretion conferred in the former, among other things, in respect to routes between county-seats, "principal towns," according to a map referred to and attached to the act; and as to



those matters particularly mentioned in this section, the discretion was taken away from the commission by express statutory provision. *Camerson v. State Highway Comm.*, 188 N. C. 84, 123 S. E. 465.

**§ 3846 (f). Establishment. Appointment, terms of office, etc., of commissioners.**

A state highway commission is hereby created, to consist of a chairman from the state at large, who shall be a practical business man, and who shall be known as the state highway commissioner; and nine (9) commissioners, one from each construction district as hereinafter designated, three of whom shall be of the minority political party, one for each of the three terms, all to be appointed by the governor, such appointments to be confirmed by the senate. The state highway commissioner of the existing highway commission and all other commissioners whose terms do not expire on April first, one thousand nine hundred and twenty-one, shall hold office during their present unexpired terms. At the expiration of the present term of the chairman, and any commissioner whose term has not expired, his successor shall be appointed by the governor for a period of six years, such appointment to be confirmed by the senate. Two of said commissioners shall be appointed for two years from April first, one thousand nine hundred and twenty-one; three of said commissioners shall be appointed for four years from April first, one thousand nine hundred and twenty-one; three of said commissioners shall be appointed for six years each, such appointments to be confirmed by the senate: *Provided*, that any commissioner appointed or elected under this article may be removed by the governor for cause. In case of the death, resignation, or removal from his district of any commissioner during his term of office, his successor shall be appointed by the governor from the same construction district and from the same political party in which the vacancy occurs to fill out his unexpired term, such appointment to be confirmed by the next senate. At the expiration of the term of the chairman, and the various commissioners, their successors shall be appointed by the governor for a term of six years each, such appointments to be confirmed by the senate. The state highway commissioner shall devote his entire time and attention to the work of the commission and receive as compensation and salary therefor fifty-five hundred dollars (\$5500) per annum, payable monthly, and his actual traveling expenses when engaged in the discharge of his duties. [*Provided*, that the State Highway Commissioner may in their discretion increase the compensation and salary of said commissioner, said salary not to exceed fifteen thousand dollars (\$15,000) in discretion of highway commissioners]. Said state highway commissioner shall be vested with all the authority of said commission when same is not in session. The members of the state highway commission, other than the chairman of the commission, shall each receive ten dollars (\$10) per day while engaged in the discharge of the duties of their office, and their actual traveling ex-

penses. The headquarters and main office of the state highway commission shall be located at the state capital. The members of the said commission, at their first meeting, shall organize and adopt a common seal; they shall keep minutes of their meetings, which shall be open to public inspection; they shall have the power to adopt and enforce rules and regulations for the government of their meetings and proceedings, and for the transaction of the business of the commission; and shall have the power and authority to make all rules and regulations for carrying out the true intent and purposes of this article. They shall meet at the offices of the commission at such regular times, not less than quarterly, as they may by rule provide, and may hold special meetings at any time and place at the call of the chairman, or any five members. The first meeting of the commission shall be at the call of the governor as soon as practicable after the ratification of this article. (1921, c. 2, s. 4; 1924, c. 16.)

#### **§ 3846 (j). Powers of commission.**

See note to § 3846(c).

#### **§ 3846 (v). Enforcing claims against contractor by action on bond.**

No action shall be brought upon any bond given by any contractor of the highway commission, by any laborer, materialman or other person until and after the completion of the work contracted to be done by the said contractor. Any laborer, materialman or other person having a claim against the said contractor and the bond given by such contractor, shall file a statement of the said claim with the contractor and with the surety upon his bond, and, in the event the surety is a corporation, with the general agent of such corporation, within the State of North Carolina, within six (6) months from the completion of the contract, and a failure to file such claim within said time shall be a complete bar against any recovery on the bond of the contractor and the surety thereon. Only one suit or action may be brought upon the said bond and against the said surety, which suit or action shall be brought in one of the counties in which the work and labor was done and performed and not elsewhere. The procedure pointed out in chapter one hundred of the Public Laws of nineteen hundred twenty-three, [section 2445], shall be followed. No surety shall be liable for more than the penalty of the bond. Any person entitled to bring an action shall have the right to require the State Highway Commission to furnish information as to when the contract is completed, and it shall be the duty of the Highway Commission to give to any such person proper notice. If the full amount of the liability of the surety on said bond is insufficient to pay the said amount of all claims and demands, then, after paying the full amount due the State Highway Commission, the remainder shall be distributed pro rata among the claimants. Any claim of the State Highway Commission against the said bond and the surety thereon shall be preferred as against any cause of



action in favor of any laborer, materialman or other persons and shall constitute a first lien or claim against the said bond and the surety thereon. (1921, c. 2, s. 15; 1923, c. 160, s. 3; 1925, cc. 260, 269.)

**Editor's Note.**—The section is not in any way an amendment of the former one. The legislature merely selected this position for it at the same time repealing the old section.

### **§ 3846 (y). Elimination of grade crossings.**

Whenever any road or street forming a link in or a part of the State highway system, whether under construction or heretofore or hereafter constructed, shall cross or intersect any railroad at the same level or grade, and in the opinion of the chairman of the State Highway Commission such grade crossing is dangerous to the traveling public, or unreasonably interferes with or impedes the traffic on said State highway, the State Highway Commission shall issue notice requiring the person or company operating such railroad to appear before the State Highway Commission, at its office in Raleigh, upon a day named, which shall not be less than ten days or more than twenty days from the date of said notice, and show cause, if any it has, why such railroad company shall not be required to alter such crossing in such way as to remove such dangerous condition and to make such changes and improvements thereat as will safeguard and secure the safety and convenience of the traveling public thereafter. Such notice shall be served on such railroad company as is now provided by law for the service of summons on domestic corporations, and officers serving such notice shall receive the same fees as now provided by law for the service of such summons.

(b) Upon the day named, the State Highway Commission shall hear said matter and shall determine whether such crossing is dangerous to public safety, or unreasonably interferes with traffic thereon. If it shall determine that said crossing is, or upon the completion of such highway will be, dangerous to public safety and its elimination or safeguarding is necessary for the proper protection of the traffic on said State highway, the State Highway Commission shall thereupon order the construction of an underpass or overpass at said crossing or it may in its discretion order said railroad company to install and maintain gates, alarm signals or other approved safety devices if and when in the opinion of said commission upon the hearing as aforesaid the public safety and convenience will be secured thereby. And said order shall specify that one-half of the cost of the construction of such underpass or overpass or the installation of such safety device shall be borne by the State Highway Commission and one-half thereof by the railroad company operating such railroad, as provided in section (c) hereof, but in no instance shall the State Highway Commission bear any part of the cost of the maintenance of any structure or safety device

so constructed or installed except in the maintenance of an overhead separation.

(c) Upon the filing and issuance of the order as hereinbefore provided for requiring the construction of any underpass or overpass or the installation and maintenance of gates, alarm signals or other safety devices at any crossing upon the State highway system, it shall be the duty of the railroad company operating the railroad with which said public road or street intersects or crosses to construct such underpass or overpass or to install and maintain such safety device as may be required in said order. The work may be done and material furnished either by the railroad company or the State Highway Commission, as may be agreed upon, and, in case of an underpass, the railroad company shall be responsible for one-half of the expense of all excavations through the existing railroad fill as well as one-half of the complete cost of the structure, including both the foundation and superstructure; and in case of an overpass, the railroad company shall be responsible for one-half of the entire cost of the bridge which will span the opening over the tracks of the railroad from abutment to abutment and including such abutments. And if a grade crossing is not eliminated by an overpass or underpass, the railroad company shall be responsible for one-half of the cost of installing gates, alarm signals or other approved safety devices. If the work is done and material furnished by the railroad company, an itemized statement of the total amount expended therefor shall, at the completion of the work, be furnished the State Highway Commission, and the commission shall pay such amount to the railroad company as may be shown on such statement after deducting the amount for which the railroad company is responsible; and if the work is done by the State Highway Commission, an itemized statement of the total amount expended shall be furnished to the railroad company, and the railroad company shall pay to the State Highway Commission such part thereof as the railroad company may be responsible for as herein provided; such payment by the railroad company shall be under such rules and regulations and by such method as the State Highway Commission may provide.

(d) That within sixty days after the issuance of the order for construction of an underpass or the installation of other safety device as herein provided for, the railroad company against which such order is issued shall submit to the State Highway Commission plans for such construction or installation, and within ten days thereafter said State Highway Commission, through its chairman, shall notify such railroad company of its approval of said plan or of such changes and amendments thereto as to it shall seem advisable. If such plans are not submitted to the State Highway Commission by said railroad company within sixty days as aforesaid, the chairman of the State Highway Commission shall have plans prepared and submit them to the railroad company. The railroad company shall within ten days notify the chairman of its approval



of the said plans or shall have the right within such ten days to suggest such changes and amendments in the plans so submitted by the chairman of the State Highway Commission as to it shall seem advisable. The plans so prepared and finally approved by the chairman of the State Highway Commission shall have the same force and effect, and said railroad company shall be charged with like liability, and said underpass or overpass shall be constructed or such safety device installed in accordance therewith as if said plans had been originally prepared and submitted by said railroad company. If said railroad company shall fail or neglect to begin or complete the construction of said underpass or overpass, or the installation of such safety device, as required by the order of the State Highway Commission, said commission is authorized and directed to prepare the necessary plans therefor, which plans shall have the same force and effect, and shall fix said railroad company with like liability, as if said plans had been originally prepared and submitted by said railroad company, and the State Highway Commission shall proceed to construct said underpass or overpass or install such safety device in accordance therewith. An accurate account of the cost of said construction or installation shall be kept by the State Highway Commission and upon the completion of such work a statement of that portion thereof chargeable to such railroad company as set out in the order of the commission shall be rendered said railroad company. Upon the failure or refusal of said company to pay the bill so rendered, the Highway Commission shall recover the amount thereof by suit therefor against said company in the Superior Court of Wake County: *Provided*, that the payment by such railroad company of said proportionate part may be made under such rules and regulations and by such method as the State Highway Commission may provide. If the State Highway Commission shall undertake to do the work, it shall not obstruct or impair the operation of the railroad and shall keep the roadbed and tracks safe for the operation of trains at every stage of the work. That if said railroad company shall construct such underpass or overpass or shall install such safety devices in accordance with the order of the State Highway Commission, one-half of the cost of such construction shall upon the completion of said work be paid to such railroad company by the State Highway Commission. The State Highway Commission may inspect and check the expenditures for such construction or installation so made by the railroad company and an accurate account of the cost thereof shall upon the completion of said work be submitted to the commission by the railroad company. If the Highway Commission shall neglect or refuse to pay that portion of the cost of said construction or installation chargeable to it, the railroad company shall recover the amount thereof by suit therefor against the Highway Commission in the Superior Court of Wake County.

(e) If any railroad company so ordered by the State Highway Commission to construct an underpass or overpass or to install safety

devices at grade crossings as hereinbefore provided for shall fail or refuse to comply with the order of the State Highway Commission requiring such construction or installation, said railroad company shall be guilty of a misdemeanor and shall be fined not less than fifty nor more than one hundred dollars in the discretion of the court for each day such failure or refusal shall continue, each said day to constitute a separate offense.

(f) The jurisdiction over and control of said grade crossings and safety devices upon the State highway system herein given the State Highway Commission shall be exclusive.

(g) From any order or decision so made by the State Highway Commission the railroad company may appeal to the Superior Court of the county wherein is located the crossing affected by said order. Such appeal shall not defer or delay the construction of such underpass or overpass or the installation of such safety device as required by the order of the commission, but the railroad company shall proceed to comply with such order in accordance with its terms. The action of the railroad company in complying with and carrying out such order pending said appeal shall not prejudice or affect the rights or remedies of such railroad company on such appeal. Upon such appeal the court shall determine only whether the order of the commission for such construction or installation is unreasonable and unnecessary for the protection of the traveling public and the apportionment of the cost to the extent hereinafter provided in this subsection, and if upon the hearing of said appeal it shall be determined that said order was unnecessary for the protection of the traveling public, the State Highway Commission shall bear the total cost of the construction of such underpass or overpass or the installation of such safety device. In event the decision on appeal should be that the construction or installation was necessary but the cost thereof unreasonable, then the railroad company shall bear its proportion (not to exceed fifty per cent) of such cost as may be determined on appeal would have been reasonable to meet the necessity in the instant case. Upon said appeal from an order of the State Highway Commission, the burden of proof shall be upon the railroad company, and if it shall not be found and determined upon said appeal that said order was unreasonable or unnecessary for the protection of the traveling public at said crossing, then such railroad company shall bear its proportion of the cost of such construction or installation in accordance with this act. (1921, c. 2, s. 19; 1925, c. 277.)

#### **§ 3846 (bb) 1. Purchase of equipment and resale to counties.**

The State Highway Commission may at its discretion, and is hereby authorized, when requested by the board of county commissioners, county highway commission, or body having charge of the construction or maintenance of roads in any county in the State, to



make purchases and resell to said county any equipment, supplies, machinery, trucks, motor vehicles, and material to be used in connection with the construction or upkeep of the said roads; and is hereby likewise authorized, upon request of the board of county commissioners, board of education, or other body having the right to contract in the premises, to buy motor vehicles, equipment and supplies to be used in connection with the transportation of pupils to and from the said schools, and resell the same to said counties: *Provided, however*, that the State Highway Commission may require such deposit or assurances on the part of the county as they may deem proper before making said purchase or reselling to said county. (1924, c. 69.)

**§ 3846 (ff). Connection of highways with improved streets; pipe lines and conduits; cost.**

**Editor's Note.**—For act applicable to Durham county only see Acts 1925, c. 312.

**§ 3846 (ii). How funds used.**

The revenues derived in each fiscal year under chapter 55, article 3, and 3(A) shall be set aside and paid out for the purposes following:

First. A sum sufficient to defray the expenses of the State Highway Commission, but not exceeding two hundred and fifty thousand dollars (\$250,000) annually, and a sum sufficient to pay all expenses of collecting the revenues provided hereby, including clerical assistance, the cost of furnishing number plates and mailing same, and the cost of necessary blanks, books and other supplies, such expenses of collecting to be approved by the chairman of the State Highway Commission and not to exceed in any fiscal year four per cent of the total amount of the collections in such year;

Second. A sum sufficient to pay the principal and interest falling due in such fiscal year and on the first day of the ensuing July upon all highway bonds issued and to be issued under this act and under any act or acts passed by the General Assembly at its regular session in one thousand nine hundred and twenty-five or thereafter, including a sum sufficient to make the five hundred thousand dollars (\$500,000) annual sinking fund payments required by chapter one hundred eighty-eight (188), Public Laws one thousand nine hundred and twenty-three, [ch. 125, art. 12] upon the sixty-five million dollars (\$65,000,000) bonds issued and to be issued under this act, such payments to be made in the fiscal year in which falls the beginning of the calendar year in which said chapter one hundred eighty-eight (188) required the same to be made; said five hundred thousand dollars (\$500,000) sinking fund payments for each year to and including the fiscal year one thousand nine hundred and twenty-seven, and one thousand nine hundred and twenty-eight, ag-

gregating two million five hundred thousand dollars (\$2,500,000), having been anticipated and having heretofore been paid;

Third. Any surplus of such revenues in any fiscal year including any unused balances of the maximum amounts hereinabove provided for the expenses of the commission and collection of revenues, after provision has been made for all the items hereinabove set forth in this section, shall be subject to disposition by the Highway Commission in the maintenance of highways in the State highway system, and in the construction and reconstruction of highways in said system and in meeting the requirements of the United States government as to Federal aid in such construction and reconstruction. No part of such revenues shall be used in the maintenance, construction and reconstruction of highways or in meeting Federal aid requirements unless the above requirements for expense, interest, principal and sinking fund have been met or can be met from such revenues. If at any time such revenues should be insufficient for interest, principal and sinking fund payments herein required to be made, and for proper maintenance of the highways in the State highway system, additional revenues for such purposes shall be provided by the General Assembly. It shall be lawful to reduce in any year the revenues provided hereby, by act of the General Assembly, which may authorize such redemption for a period not longer at one time than the biennium for which appropriations for general expense are permitted, but no such act shall be passed unless (a) the sinking fund commission, or if there be no sinking fund commission, the State Treasurer, shall certify to the General Assembly the amount required for the principal, interest and sinking fund payments and (b) the State Highway Commission shall certify to the General Assembly the amount required for maintenance of highways and (c) the General Assembly shall determine that the proposed reduction may be made without prejudice to the payment from the remaining revenues of the amounts so certified for principal, interest, sinking fund and maintenance of highways, as well as the maximum amounts herein set aside to defray the expenses of the commission and for expenses of collection: *Provided, however*, that no holder of any highway bonds of the State shall be prejudiced by this amendment or by any act amendatory of this section passed subsequent to the issuance of such bonds, and any such bondholder shall be entitled to all the rights to which he would be entitled if no such amendment had been made. (1921, c. 2, s. 27; 1923, c. 263, s. 1; 1925, c. 45, s. 45; 1925, c. 133, s. 2.)

#### ART. 15 (A) ADDITIONAL BOND ISSUE.

#### § 3846 (qq) 1. Authorization; maturity.

For the purpose of providing additional means for carrying out the provisions of Article fifteen of chapter seventy, as amended and of enabling the State to avail itself to the fullest extent of all Federal



aid funds that are now or may become available for use in the State for road purposes, the State Treasurer is hereby authorized by and with the consent of the Governor and Council of State to issue and sell not exceeding twenty million (\$20,000,000) dollars, bonds of the State to be designated "State of North Carolina Highway Serial Bonds," maturing in annual installments on the first day of January in the following amounts and years: Six hundred thousand (\$600,000) dollars in one thousand nine hundred thirty, six hundred and fifty thousand (\$650,000) dollars in one thousand nine hundred thirty-one, seven hundred thousand (\$700,000) dollars in one thousand nine hundred thirty-two, seven hundred fifty thousand (\$750,000) dollars in one thousand nine hundred thirty-three, seven hundred fifty thousand (\$750,000) dollars in one thousand nine hundred thirty-four, eight hundred thousand (\$800,000) dollars in one thousand nine hundred thirty-five, eight hundred thousand (\$800,000) dollars in one thousand nine hundred and thirty-six, eight hundred fifty thousand (\$850,000) dollars in one thousand nine hundred thirty-seven, nine hundred thousand (\$900,000) dollars in one thousand nine hundred thirty-eight, nine hundred fifty thousand (\$950,000) dollars in one thousand nine hundred thirty-nine, one million (\$1,000,000) dollars in one thousand nine hundred forty, one million fifty thousand (\$1,050,000) dollars in one thousand nine hundred forty-one, one million one hundred thousand (\$1,100,000) dollars in one thousand nine hundred forty-two, one million one hundred fifty thousand (\$1,150,000) dollars in one thousand nine hundred forty-three, one million two hundred thousand (\$1,200,000) dollars in one thousand nine hundred forty-four, one million two hundred fifty thousand (\$1,250,000) dollars in one thousand nine hundred and forty-five, one million three hundred thousand (\$1,300,000) dollars in one thousand nine hundred forty-six, one million three hundred fifty (\$1,350,000) dollars in one thousand nine hundred forty-seven, one million four hundred thousand (\$1,400,000) dollars in one thousand nine hundred forty-eight, and one million four hundred fifty thousand (\$1,450,000) dollars in one thousand nine hundred forty-nine, without option of prior payment. The Governor and Council of State shall not consent in the year one thousand nine hundred twenty-five to the issuance of more than ten million (\$10,000,000) dollars bonds. This authorization of bond shall not take the place, any authorization heretofore made but shall be additional thereto. The said bonds shall bear interest at a rate to be fixed by the Governor and Council of State, but not exceeding five per cent per annum to be payable semi-annually on the first days of January and July. (1925, c. 35, s. 2.)

### **§ 3846 (qq) 2. Interest coupons; registration; form.**

Said bonds shall carry interest coupons which shall bear the signature of the State Treasurer, or a facsimile thereof, and said bonds shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and

the form or denominations thereof shall be such as the State Treasurer may determine in conformity with this article. (1925, c. 35, s. 3.)

### **§ 3846 (qq) 3. Sale of bonds.**

Before selling the bonds herein authorized to be issued the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem most effectual to secure the best price. He is authorized to accept bids for all or any portion of the bonds advertised and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is empowered to sell the bonds herein authorized in such manner as in his judgment will produce the best price, but not for less than par and accrued interest. All expenses necessarily incurred in the preparation and sale of the bonds be paid from the proceeds of such sale. (1925, c. 35, s. 4.)

### **§ 3846 (qq) 4. Disposition of proceeds.**

The proceeds of said bonds and of the bond anticipation notes herein authorized (except the proceeds of bonds the issuance of which has been anticipated by such bond anticipation notes) shall be placed by the treasurer in the construction fund known as the "State Highway Fund." (1925, c. 35, s. 5.)

### **§ 3846 (qq) 5. Issuance of notes by treasurer.**

By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

(a) For anticipating the sale of any of said bonds to the issuance of which the Governor and Council of State shall have given consent, if the treasurer shall deem it advisable to postpone the issuance of such bonds.

(b) For the payment of interest upon or any installment of principal of any of said bonds then outstanding, if there shall not be sufficient funds in the State Treasury with which to pay such interest or installment as they respectively fall due.

(c) For the renewal of any loan evidenced by notes herein authorized. (1925, c. 35, s. 6.)

### **§ 3846 (qq) 6. Payment of such notes; interest.**

Notes issued in anticipation of the sale of said bonds shall be paid with funds derived from the sale of the bonds unless otherwise provided for by the General Assembly, and notes issued for



the payment of interest and installments of principal shall be paid from funds provided by the General Assembly for the payment of such interest and principal when such funds are collected. Interest payments upon said notes may be evidenced by interest coupons in the treasurer's discretion. (1925, c. 35, s. 7.)

**§ 3846 (qq) 7. Credit of state pledged.**

The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the bonds and notes herein authorized. (1925, c. 35, s. 8.)

**§ 3846 (qq) 8. Coupons receivable for what claims.**

The coupons of said bonds and notes after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 35, s. 9.)

**§ 3846 (qq) 9. Exemption of bonds from taxation.**

All of said bonds and notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income, nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1925, c. 35, s. 10.)

**§ 3846 (qq) 10. Fiduciaries may invest in bonds.**

It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in said bonds and notes. (1925, c. 35, s. 11.)

ART. 15(B) BRIDGE AUTHORIZED; BOND ISSUE.

**§ 3846 (qq) 11. Bridge authorized.**

The State Highway Commission is hereby authorized, empowered and directed to build a bridge across the lower Chowan River between the counties of Bertie and Chowan, which bridge shall be and become a part of the State highway system. (1925, c. 74, s. 1.)

**§ 3846 (qq) 12. Bond issue authorized.**

For the purpose of obtaining funds with which to build said bridge, its approaches and abutments, and acquiring the necessary land or rights therefor, the State Treasurer is hereby authorized, by and with the consent of the Governor and Council of State, to issue and sell not exceeding six hundred thousand (\$600,000) dollars bonds of the State to be designated "State of North Carolina Highway Serial Bonds" maturing in annual installments on the first day of January, beginning not later than nineteen hundred and thirty

(1930) and running not longer than nineteen hundred and forty-nine (1949), the amount of each annual installment to be fixed by the Governor and Council of State. The said bonds shall bear interest at a rate to be fixed by the Governor and Council of State, but not exceeding five per cent per annum to be payable semiannually on the first days of January and July. (1925, c. 74, s. 2.)

**§ 3846 (qq) 13. Coupons; registration; form.**

Said bonds shall carry interest coupons which shall bear the signature of the State Treasurer or a facsimile thereof, and said bonds shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and the form and denominations thereof shall be such as the State Treasurer may determine in conformity with this article. (1925, c. 74, s. 3.)

**§ 3846 (qq) 14. Sale of bonds.**

Subject to determination by the Governor and Council of State as to the manner in which said bonds shall be offered for sale, whether by publishing notices in certain newspapers and financial journals or by mailing notices or by inviting bids by correspondence or otherwise, the State Treasurer is authorized to sell said bonds at one time or from time to time at the best price obtainable, but in no case for less than par and accrued interest, and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina. All expenses necessarily incurred in the preparation and sale of the bonds shall be paid from the proceeds of such sale. (1925, c. 74, s. 4.)

**§ 3846 (qq) 15. Disposition of proceeds.**

The proceeds of said bonds and of the bond anticipation notes herein authorized (except the proceeds of bonds the issuance of which has been anticipated by such bond anticipation notes) shall be placed by the treasurer in the construction fund known as the "State Highway Fund," but shall be used only for the purposes of this article. (1925, c. 74, s. 5.)

**§ 3846 (qq) 16. Issuance of notes by treasurer.**

By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

(a) For anticipating the sale of any of said bonds to the issuance of which the Governor and Council of State have given consent if the treasurer shall deem it advisable to postpone the issuance of such bonds.

(b) For the payment of interest upon or any installment of prin-



cipal of any of said bonds then outstanding if there shall not be sufficient funds in the State Treasury with which to pay such interest or installment as they respectively fall due.

(c) For the renewal of any loan evidenced by notes herein authorized. (1925, c. 74, s. 6.)

### **§ 3846 (qq) 17. Payment of such notes.**

Notes issued in anticipation of the sale of said bonds shall be paid with funds derived from the sale of the bonds unless otherwise provided for by the General Assembly and notes issued for the payment of interest and installments of principal shall be paid from funds provided by the General Assembly for the payment of such interest and principal when such funds are collected. Interest payments upon said notes may be evidenced by interest coupons in the Treasurer's discretion. (1925, c. 74, s. 7.)

### **§ 3846 (qq) 18. Credit of state pledged.**

The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the bonds and notes herein authorized. (1925, c. 74, s. 8.)

### **§ 3846 (qq) 19. Coupons receivable for what claims.**

The coupons of said bonds and notes after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 74, s. 9.)

### **§ 3846 (qq) 20. Bonds exempt from taxation.**

All of said bonds and notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income, nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation. (1925, c. 74, s. 10.)

### **§ 3846 (qq) 21. Fiduciaries may invest in bonds.**

It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in said bonds and notes. (1925, c. 74, s. 11.)

### **§ 3846 (qq) 22. Collection of tolls for use of bridge.**

Unless and until otherwise directed by the General Assembly, the State highway commission shall charge and collect tolls for the privilege of using the bridge herein directed to be built, which tolls shall be at such rates as will in the judgment of said commission produce an amount sufficient to pay the principal and interest of the bonds herein authorized, and the interest on notes issued in anticipation of the sale of said bonds as such principal and interest become

due: *Provided, however*, that when the sinking fund commission, or if there be no such commission, the State Treasurer shall certify to the State highway commission that in its opinion the tolls received, after adding any surplus of the bond proceeds remaining over after paying for the bridge, abutments, approaches and necessary land or rights, and after subtracting the expenses of collecting the tolls, the cost of maintaining the bridge and any other disbursements made necessary because of the erection and operation of the bridge, are sufficient, together with reasonable anticipated interest accretions, to meet the payment of all principal and interest upon the bonds herein authorized, then the highway commission shall suspend the collection of further tolls for the use of said bridge. (1925, c. 74, s. 12.)

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## CHAPTER 71

### SALARIES AND FEES

#### ART. 2. LEGISLATIVE DEPARTMENT

#### § 3857. Committee to examine treasurer's and auditor's books.

(Repealed; Act 1925, c. 110, s. 2.)

#### § 3857 (a). Compensation of employees of General Assembly.

The principal clerks of the General Assembly and chief clerk appointed by Secretary of State in the enrolling office and chief engrossing clerks of the House and Senate shall be allowed the sum of seven dollars per day during the session of the General Assembly and the same mileage as members of the General Assembly. The secretary to the Speaker of the House of Representatives, the secretary to the Lieutenant Governor, the sergeant at arms, the assistants to the engrossing clerks, the assistant clerks to the principal clerks and the assistant sergeant at arms of the General Assembly, and the assistants appointed by the Secretary of State to supervise the enrollment of bills and resolutions, the reading clerks of the General Assembly, shall receive the sum of six dollars per day and the same mileage as members of the General Assembly, the clerks to all committees which by the rules of either House of the General Assembly are entitled to clerks shall each receive five dollars per day during the session of the General Assembly and the same mileage as members of the General Assembly. The chief page of the House of Representatives and of the Senate shall receive four dollars per day during the session of the General Assembly and mileage at the rate of five cents a mile from their homes to Raleigh and return. All other pages authorized by either of the two Houses shall receive two dollars and one-half per day during the session of the General



Assembly and mileage at the rate of five cents a mile from their homes to Raleigh and return. All laborers of the first class authorized by law or the rules of either the House of Representatives or the Senate shall receive three dollars and one-half per day during the session of the General Assembly and all mileage at the rate of five cents per mile from their homes to Raleigh and return, and laborers of the second class the sum of three dollars per day and mileage at the rate of five cents per mile from their homes to Raleigh and return. (1925, c. 72, s. 1.)

### **§ 3857 (b). Laws repealed; exceptions.**

All laws, clauses of laws, parts of laws, rules or regulations of either the House of Representatives or the Senate, other than sections three thousand eight hundred and fifty-five (3855) and three thousand eight hundred and fifty-five (a), (3855a) of the Consolidated Statutes, in conflict with sections 3857(a) to 3857(b) are hereby repealed and declared null and void. (1925, c. 72, s. 2.)

### **§ 3857 (c). Application of sections.**

Sections 3857(a) to 3857(c) shall apply to the herein enumerated clerks, assistant clerks, pages, laborers and other employees of the General Assembly from the beginning of the session of nineteen hundred and twenty-five. (1925, c. 72, s. 3.)

### **§ 3857 (d). Classification of laborers.**

The chairman of the committee on rules of the House of Representatives and the chairman of the committee on rules of the Senate are hereby authorized, empowered and directed to classify the laborers of the General Assembly and certify to the chief clerk of the House of Representatives and the chief clerk of Senate the names of all laborers of the first class and all laborers of the second class, to the end that proper warrants may be issued in payment of services rendered in accordance with sections 3857(a), 3857(b), and 3857(c), and the list when certified shall be the classification of such laborers and they shall be paid accordingly. (1925, ch. 116.)

## **ART. 3. EXECUTIVE DEPARTMENT**

### **§ 3860. Executive secretary.**

(Repealed by Acts of 1925, c. 275, s. 6.)

### **§ 3861. Governor and council to fix certain salaries.**

The governor and council of state shall constitute a board to adjust and fix the compensation to be paid to the several assistants, chief clerks, clerks and assistants, in the various departments of the state government affected by sections 3861, 3863, 3867-3870, 3873, 3874, and 4668, including employees of the supreme court, [and the State Library] and including the private secretary of the governor:

Provided, that nothing herein shall in any way affect the provisions of sections 3861(c) and 3861(d), except such as are by law required to give bond to the state. [Provided further, that the above proviso shall not apply to employees of the State Library] (1921, c. 143, ss. 1, 4; Ex. Sess. 1921, c. 29; 1924, c. 124.)

### **§ 3879. State standard-keeper.**

(Repealed by Acts of 1925, c. 275, s. 6.)

## **ART. 4. JUDICIAL DEPARTMENT**

### **§ 3883. Supreme court justices.**

Each justice of the supreme court shall be paid an annual salary of six thousand dollars, and [five hundred] dollars annually in lieu of and in commutation for traveling expenses. They shall each be allowed nine hundred dollars annually for stenographer or clerk. (Rev., s. 2764; Code, s. 3733; 1891, c. 193; 1903, c. 805; 1905, c. 208; 1907, cc. 841, 988; 1909, c. 486; 1911, c. 82; 1915, c. 44; 1919, c. 51; 1921, c. 25, s. 2; 1925, c. 214.)

### **§ 3884. Superior court judges.**

The salary of each of the judges of the superior court shall be five thousand dollars per annum, and each judge shall be allowed the sum of one thousand [five] hundred and fifty dollars in lieu of his traveling expenses, to be paid monthly. They shall also receive one hundred dollars per week and their actual expenses incurred in attending and holding special terms of court by assignment of the governor, which expenses shall be paid by the county in which such special term is held. (Rev., s. 2765; Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; 1921, c. 25, s. 3; 1925, c. 227.)

## **ART. 7. COUNTY OFFICERS**

### **§ 3907 (a). Modifications as to fees of register of deeds in Polk county.**

The register of deeds of Polk County shall be entitled to receive fees in excess of those allowed by section three thousand nine hundred and six of the Consolidated Statutes as follows:

The register of deeds shall be allowed, while and when acting as clerk to the board of county commissioners, such per diem as the board may allow, not exceeding four dollars per day;

For making out original tax list, five cents for each name thereon;

For each name on each copy required to be made, five cents;

For recording and issuing each order of commissioners, twenty cents. Where a standing order is made for the payment of money monthly there shall be charged but one fee thereof.

For registering chattel mortgage, statutory form, forty cents. (1925, ch. 44.)



**§ 3908. Sheriffs.**

Sheriffs shall be allowed the following fees and expenses, and no other, namely:

Executing summons or any other writ or notice, sixty cents; but the board of county commissioners may fix a less sum than sixty cents, but not less than thirty cents, for the service of each road order.

Arrest of a defendant in a civil action and taking bail, including attendance to justify, and all services connected therewith, one dollar.

Arrest of a person indicted, including all services connected with the taking and justification of bail, one dollar.

Imprisonment of any person in a civil or criminal action, thirty cents; and release from prison, thirty cents.

Executing subpoena on a witness, thirty cents.

Conveying a prisoner to jail to another county, ten cents per mile.

For prisoner's guard, if any necessary, and approved by the county commissioners, going and returning, per mile for each, five cents.

Expense of guard and all other expenses of conveying prisoner to jail, or from one jail to another for any purpose, or to any place of punishment, or to appear before a court or justice of the peace in another county, or in going to another county for a prisoner, to be taxed in the bill of costs and allowed by the board of commissioners of the county in which the criminal proceedings were instituted.

For allotment of widow's year's allowance, one dollar.

In claim and delivery for serving the original papers in each case, sixty cents, and for taking the property claimed, one dollar, with the actual cost of keeping the same until discharged by law, to be paid on the affidavit of the returning officer.

For conveying prisoners to the penitentiary, two dollars per day and actual necessary expenses; also one dollar a day and actual necessary expenses for each guard, not to exceed one guard for every three prisoners, as the sheriff upon affidavit before the clerk of the superior court of his county shall swear to be necessary for the safe conveyance of the convicts, to be paid by [the board of commissioners of the county in which the criminal proceedings were instituted.]

Providing prisoners in county jail with suitable beds, bed-clothing, other clothing and fuel, and keeping the prison and grounds cleanly, whatever sum shall be allowed by the commissioners of the county.

Collecting fine and costs from convict, two and a half per cent on the amount collected.

Collecting executions for money in civil actions, two and a half per cent on the amount collected; and the like commissions for all moneys which may be paid to the plaintiff by the defendant while the execution is in the hands of the sheriff.

Advertising a sale of property under execution at each public place required, fifteen cents.

Seizing specific property under order of a court, or executing any other order of a court or judge, not specially provided for, to be allowed by the judge or court.

Taking any bond or undertaking, including furnishing the blanks, fifty cents.

The actual expense of keeping all property seized under process or order of court, to be allowed by the court on the affidavit of the officer in charge.

A capital execution, ten dollars, and actual expense of burying the body.

Summoning a grand or petit jury, for each man summoned, thirty cents, and ten cents for each person summoned on the special venire.

For serving any writ or other process with the aid of the county, the usual fee of one dollar, and the expense necessarily incurred thereby, to be adjudged by the county commissioners, and taxed as other costs.

All just fees paid to any printer for any advertisement required by law to be printed.

Bringing up a prisoner upon habeas corpus, to testify or answer to any court or before any judge, one dollar, and all actual and necessary expenses for such services, and ten cents per mile by the route most usually traveled, and all expenses for any guard actually employed and necessary.

For summoning and qualifying appraisers, and for performing all duties in laying off homesteads and personal property exemptions, or either, two dollars, to be included in the bill of costs.

For levying an attachment, one dollar.

For attendance to qualify jurors to lay off dower, or commissioners to lay off year's allowance, one dollar; and for attendance, to qualify commissioners for any other purpose, seventy-five cents.

Executing a deed for land or any interest in land sold under execution, one dollar, to be paid by the purchaser.

Service of writ of ejectment, one dollar.

For every execution, either in civil or criminal cases, fifty cents.

Whenever any precept or process shall be directed to the sheriff of any adjoining county, to be served out of his county, such sheriff shall have for such service not only the fees allowed by law, but a further compensation of five cents for every mile of travel going to and returning from service of such precept or process: Provided, that whenever any execution of five hundred dollars or upwards shall be directed to the sheriff of an adjoining county, under this chapter, such sheriff shall not be allowed mileage, but only the commissions to which he shall be entitled. [*Provided*, that when the summons in a civil action or special proceedings shall be from any court of any county other than his own county, the sheriff's fees for serving the same shall be one dollar (\$1) for each defendant named therein; and such service shall include the delivery of copy of said summons and complaint or petition attached to the original summons; and that for subpoenas served from other than the county of



said sheriff he shall receive a fee of fifty cents (50c.) for each witness named therein.

The part of this section in brackets shall not affect fees provided in section three thousand nine hundred and nine of the Consolidated Statutes for service upon the waters of the counties of Carteret, Dare, Hyde, and Pamlico.] Rev., s. 2777; Code, ss. 931, 2035, 2089, 2090, 3752; 1885, c. 262; 1891, c. 112, 143; 1903, c. 541; 1901, c. 64; R. C., c. 102, s. 21; R. C., c. 31, s. 56; 1822, c. 1132; 1924, c. 101; 1925, c. 275, s. 6.)

**Editor's Note.**—For local act applying to Hertford county only, see Acts of 1925, c. 17.

### § 3909. Local modification as to fees of sheriffs.

**Illicit Distilleries.**—The fees or emoluments incident to a sheriff's office as allowance for the seizure and destruction of illicit distilleries, are excluded by a public-local law applicable to a certain county, subsequently enacted, but prior to the commencement of the term of the incumbent, wherein it is provided that the sheriff shall turn over to the county treasurer all moneys collected from fees, and receive a specified sum as a salary in lieu of his fees, with exception only of certain fees allowed to his township deputy in certain instances, the duty to seize the illicit distilleries being the same as any other required of him as sheriff of the county. *Thompson v. Board*, 181 N. C. 265, 107 S. E. 1.

### § 3910. County treasurer.

The county treasurer shall receive as compensation in full for all services required of him such a sum, not exceeding one-half of one per cent on moneys received and not exceeding two and a half per cent on moneys disbursed by him, as the board of commissioners of the county may allow. As treasurer of the county school fund he shall receive such sum as the board of education may allow him, not exceeding two per cent on disbursements; and the said commissions shall be paid only upon the order of the county board of education, signed by the chairman and secretary, and the county board of education is hereby forbidden to sign any such order until the treasurer shall have made all reports and kept all such accounts required by law in the form and manner prescribed: *Provided*, that said treasurer shall be allowed no commission or compensation for receipts and disbursements of any loan or loans made to the county by the state board of education out of the state literary fund [the special building fund derived from county or district bond issue] for the building of schoolhouses: *Provided*, that in counties where the treasurer's total compensation cannot exceed two hundred and fifty dollars per annum the treasurer may be allowed, in the discretion of the board of county commissioners and of the board of education, as to the school fund, a sum not exceeding two and one-half per cent on his disbursements of all funds handled by him; but the compensation allowed by virtue of the provisions of this last proviso shall not be operative to give a total compensation in excess of two hundred and fifty dollars per annum to such treasurers. (Rev., s.

2778; Code, s. 770; 1899, c. 233; 1909, c. 577; 1913, c. 144; 1919, c. 254, s. 9; 1924, c. 121, s. 6.)

**Commissioner for Drainage Assessments.**—The claim of the treasurer of the county for commissions derived from assessments in Mattamuskeet Drainage District is not allowed on this appeal, under the decision of *Board v. Credle*, 182 N. C. 442, 109 S. E. 88, which also covers the question as to commissions on the receipt and disbursement of canal tolls by him. *Drainage Comm'rs v. Brinn*, 182 N. C. 447, 109 S. E. 90.

Semble, this section, cannot be construed to allow additional compensation to the county treasurer for receiving and disbursing money of a drainage district under section 36, ch. 442, Laws of 1909, the acts being unrelated; but, if otherwise, the county treasurer must bring himself within the provisions of this section by showing the amount claimed was allowed to him in the discretion of the county commissioners, within the limit fixed by the statute, and that the regular procedure followed as to the drawing of the warrants by the drainage commission upon funds on hand derived from collections for the benefit of the drainage district alone, etc. *Board v. Credle*, 182 N. C. 442, 109 S. E. 88.

**Statutes Construed Together.**—The relevant sections of the various statutes upon the subject of the collection of assessments on lands in drainage districts by sheriffs and tax collectors, and their compensation therefor, being in *pari materia*, should be construed together by the courts in ascertaining the legislative intent. *Drainage Commr's v. Davis*, 182 N. C. 140, 108 S. E. 506.

#### ART. 10. SALARY AND WAGE COMMISSION

##### § 3924 (a). Authorization; expenses; clerical assistance.

The Governor is hereby authorized and empowered to appoint a salary and wage commission of five persons, who shall receive their railroad fares, and sustenance not to exceed five dollars per day during the time they are actually engaged in the performance of their duties. These accounts shall be audited by the budget bureau and paid out of the emergency contingent fund. Clerical assistance shall be paid out of the emergency contingent fund of the general appropriation bill upon approval of the budget bureau. (1925, c. 125, § 1.)

##### § 3924 (b). Appointment; meeting.

The Governor shall on or before the first day of April, one thousand nine hundred and twenty-five, appoint five persons who are experienced and versed in the costs and values of wages and services such as are rendered by subordinate officers, clerks and employees of the executive and administrative departments, and other agencies of this State, and these persons so appointed shall meet immediately, after notice of such appointment, in the city of Raleigh, at the call of the Governor, and begin immediately the performance of their duties. (1925, c. 125, § 2.)

##### § 3924 (c). Investigation; classification of employees.

The said commission shall carefully investigate the costs and values of the wages and services rendered the State by all subordinates and employees of these departments and agencies, and they shall classify



the same and fix the salaries and wages of each class or division and shall report the same to the Governor. (1925, c. 125, § 3.)

**§ 3924 (d). Classification to be standard.**

The said classification when filed with and approved by the Governor shall become the standard salaries and wages for all subordinates, clerks and employees of these departments and agencies, and no other scheme of wages shall apply to said department and agencies, and shall include in their report, as advice and information, their findings as to the adequate number of employees for each of these departments and agencies. (1925, c. 125, § 4.)

**§ 3924 (e). Copy of report to heads of departments; list of subordinates.**

When the same shall have been approved by the Governor he shall immediately furnish a copy thereof, certified by him, to the head of each of these departments and agencies, and each department and each agency shall immediately put the same into effect so that the payroll of each department and of each agency for the next current month, after notice thereof, shall be the payroll of said department and agency until changes are made in accordance with this article.

The head of each of said departments and agencies shall, within the next current month after acceptance of said approved classifications and schedules, file a list of the subordinates, clerks and employees within each classification, with salary fixed for each classification, and a list of salaries and wages paid such subordinates, clerks and employees prior to the adoption of the classifications and wage schedules herein provided for, and the same shall constitute a public document open to the inspection of all persons, and the Governor may, in his discretion, cause the same to be printed, and the cost of printing the same charged pro rata to each department and agency. (1925, c. 125, § 5.)

**§ 3924 (f). Reassembling commission.**

Whenever it appears necessary the Governor may reassemble the said commission, or such others as he may appoint in their places and stead, to reconsider and readjust the said schedule and classification of salaries and wages, such report when filed and approved by the Governor to become the new schedule and no other shall apply, and the same may be changed from time to time in like manner. (1925, c. 125, s. 6.)

**§ 3924 (g). Auditor not to draw warrant except as fixed by commission.**

The Auditor shall not draw any warrant for the payment of any salary or wage to any subordinate, clerk or employee in any of the said departments and agencies, other than the salaries and wages fixed in the schedule provided in this article. (1925, c. 125, s. 7.)

**§ 3924 (h). Classification certified to auditor by governor.**

The Governor shall certify to the Auditor a copy of all classifications and schedules of all salaries and wages as adopted and approved as herein provided. (1925, c. 125, s. 8.)

**§ 3924 (i). Violation of article; penalty.**

A willful violation of this article in any manner by any person shall constitute a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court, and if such violator is a subordinate, clerk, or employee in any of the said departments and agencies he shall be immediately removed therefrom. (1925, c. 125, s. 9.)

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**CHAPTER 71A****SECURITIES LAW****§ 3924 (j). Definitions.**

When used in this chapter:

(a) The term "commissioner" shall mean the member of the Corporation Commission of North Carolina designated by the Governor to administer this chapter, and the term "commission" shall mean the Corporation Commission of North Carolina, which is charged with certain duties under the terms of this chapter.

(b) The term "person" shall mean and include a natural person, firm, partnership, association, syndicate, joint stock company, unincorporated company or organization, trust, incorporated or unincorporated, and any corporation organized under the laws of the District of Columbia, or of any state or territory of the United States or of any foreign government. As used herein, the term "trust" shall be deemed to include a common-law trust, but shall not include a trust created or appointed under or by virtue of a last will and testament or by a court of law or equity.

(c) The term "securities" or "security" shall include any note, stock certificate, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas, or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits or any other instrument commonly known as security.

(d) The term "sale" shall include any agreement whereby a person transfers or agrees to transfer either the ownership of or an interest in a security. Any security given or delivered with or as a bonus on account of any purchase of securities, or of any other thing



shall be deemed to constitute a part of the subject of such purchase and to have been sold for value. "Sale" or "sell" shall also include an attempt to sell, an option of a purchase or sale, a solicitation of a sale, a subscription, or an offer to sell, either directly or by agent, or by a circular letter, advertisement, or otherwise; but nothing herein shall limit or diminish the full meaning of the term "sell" or "sale" as used by or accepted in courts of law or equity.

(e) The term "issuer" shall include every person who proposes to issue or who issues or who has issued or shall hereafter issue any security (sold or to be sold, or offered or to be offered for sale).

(f) The term "intangible assets" shall mean and include patents, formulæ, good will, promotions, trade brands, franchises, titles or rights in and to intangible property, and all other like assets.

"Tangible assets" shall mean all assets other than intangible assets. (1925, c. 19, s. 2.)

### § 3924 (k). Exempted securities.

Except as hereinafter provided, the provisions of this chapter shall not apply to any security which at the time of the sale thereof is within any of the following classes of securities:

(a) Any security issued or guaranteed by the United States or by any territory or insular possession thereof, or by the District of Columbia, or by any state or municipal corporation or political subdivision or agency thereof.

(b) Any security issued or guaranteed by any foreign government with which the United States is then maintaining diplomatic relations, or by any state, province, or political subdivision thereof having the power of taxation or assessment.

(c) Any security issued by a national bank, or by any Federal land bank, or joint stock land bank or national farm loan association under the provisions of the Federal farm loan act of July seventeen, nineteen hundred and sixteen, or any amendments thereof, or by the war finance corporation, or by any corporation created or acting as an instrumentality of the government of the United States pursuant to authority granted by Congress of the United States: *Provided*, that such corporation is subject to supervision or regulation by the government of the United States.

(d) Any security issued or guaranteed as to principal, interest or dividend, by a corporation, domestic or foreign, owning or operating a railroad or any other public service utility: *Provided*, that such corporation is subject to regulation or supervision either as to its rates and charges or as to the issue of its own securities by a public commission, board, or officer, or any governmental, legislative or regulatory body of this State, or of the United States, or of any state, territory, or insular possession thereof, or of the District of Columbia, or of the Dominion of Canada, or any province thereof; also equipment trust certificates or equipment notes or bonds based on chattel mortgages, leases, or agreements for conditional sale of

cars, motive power or other rolling stock or equipment mortgaged, leased, or sold to or furnished for the use of or upon a railroad or other public service utility corporation, or equipment notes or bonds where the ownership or title of such equipment is pledged or retained in accordance with the provisions of the laws of the United States, or of any State, or of the Dominion of Canada, to secure the payment of such equipment trust certificates, bonds, or notes; also bonds, notes, or other evidence of indebtedness issued by a holding corporation and secured by collateral consisting of any of the securities herein above in this clause (d) described: *Provided*, that such collateral securities equal in par value (whichever may be the lower) at least one hundred and twenty-five (125) per cent of the par market value of the bonds, notes, or other evidences of indebtedness so secured.

(e) Securities, issued, outstanding, distributed, and fully listed upon any organized stock exchange having an established meeting place in a city of over five hundred thousand population, according to the last preceding United States census and providing facilities for the use of its members in the purchase and sale of securities listed by such exchange, and securities senior thereto and evidences of indebtedness guaranteed by companies the capital stock of which is so listed; and upon such other stock exchanges as the commissioner may from time to time by written order designate: *Provided*, that actual transactions on such organized exchanges have occurred during each of the preceding twenty years in the purchase and sale of United States bonds or other bonds of any of the classes exempted herein from the provisions of this act; and *provided further*, that such stock exchange require financial statements to be submitted at the time of such listing and annually thereafter: *Provided, further*, that the commissioner shall have power to call for additional financial information than that filed with such stock exchanges, and may, pending the filing of such information, suspend the sale of such securities and also suspend, either temporarily or permanently, the sale of any securities listed with such stock exchanges after a hearing upon notice to the issuer of such securities if commissioner shall find that the sale of such securities would work a fraud upon the purchaser thereof.

(f) Any security issued by a bank, trust company, or savings institution, which bank, trust company, or savings institution is incorporated under the laws of, and subject to the examination, supervision, and control of the United States or of any state or territory of the United States, or of any insular possession thereof.

(g) Negotiable promissory notes or commercial paper if such issue of negotiable notes or commercial paper mature in not more than fifteen months from the date of issue and shall be issued within three months after the date of sale.

(h) Securities issued by building and land banks, organized under the laws of the State of North Carolina, the capital stock of which is owned by domestic building and loan associations.



(i) Securities issued by a domestic corporation, partnership, association, company, syndicate, or trust owning property, which company, partnership, etc., has been in continuous operation for not less than five years prior thereto, and which has shown for not less than five years prior thereto, and which has shown during a period of not less than three years prior to the close of its last fiscal year preceding the offering of such securities average, annual net earnings, after deducting all prior charges, not including the charges of prior securities to be retired out of the proceeds of such sale, as follows:

(1) In the case of interest-bearing securities, not less than one and one-half times the annual interest charges thereon and upon all other outstanding interest bearing obligations of equal rank.

(2) In the case of preferred stock not less than one and one-half times the annual dividend requirements on the total of the proposed issue of such preferred stock and on all other outstanding stock of equal rank.

(3) In the case of common stock with par value not less than six per cent upon all outstanding common stock of equal rank, or in the case of common stock without par value not less than six per cent upon the amount charged to capital by reason of the issuance thereof:

*Provided*, the tangible assets of such corporation, partnership, association, company, syndicate or trust (not including any intangible assets), together with the proceeds of the sale of such securities accruing to the issuer, shall equal or exceed:

(1) In case of evidence of indebtedness, one hundred twenty-five per centum of the par value of such evidence of indebtedness, and all other obligations of equal rank then outstanding and not to be retired out of the proceeds of the sale of such evidence of indebtedness.

(2) In the case of preferred stock, one hundred twenty-five per centum of the par value of the aggregate amount of all outstanding preferred stock of equal and prior rank and the stock then offered for sale, after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the preferred stock offered for sale.

(3) In the case of common stock, one hundred per centum of the aggregate of all outstanding common stock of equal rank and the stock then offered for sale, reckoned at the price at which such stock is offered for sale or sold after the deduction from such assets of all indebtedness which will be existing and of the par value of all stock of senior rank which will be outstanding after the application of the proceeds of the common stock offered for sale: *Provided, however*, that in the case of preferred or common stock without par value computations hereunder shall be made upon the basis of the amount charged to capital by reason of the issuance thereof instead of upon the basis of par value.

(j) Securities issued by building and loan associations incorporated under the laws of the State of North Carolina.

(k) Securities issued by insurance companies in North Carolina, subject to State supervision.

(l) Securities issued by any corporation organized not for pecuniary profit or organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes.

(m) Securities evidencing indebtedness due under any contract made in pursuance to the provisions of any statute of any state of the United States providing for the acquisition of personal property under conditional sale contract.

(n) Bonds or notes secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than one hundred and twenty-five (125) per cent of the par amount of such bonds or notes. (1925, c. 190, s. 3.)

### **§ 3924 (1). Transactions exempted from operation of this chapter.**

Except as hereinafter provided, the provisions of this chapter shall not apply to the sale or the offering for sale of any security in any of the following transactions, viz.:

(1) At any judicial, executor's, administrator's, or guardian's sale, or at any sale by a receiver or trustee in insolvency or bankruptcy.

(2) By or for the account of any pledge holder or mortgagee selling or offering for sale, in the ordinary course of business, to liquidate a bona fide debt, a security pledged in good faith as security for such debt.

(3) In an isolated transaction in which any security is sold or offered for sale by the owner thereof, or by his representative for the owner's account in the usual and ordinary course of business and not for the direct or indirect promotion of any scheme or enterprise within the purview of this chapter, and when such sale or offer for sale is not made in the course of repeated and successive transactions of a like character by such owner or on his account by the representative of such owner, and neither such owner nor his representative is the maker or issuer or underwriter of such security.

(4) The sale of or offer to sell such security to any bank, savings institution, trust company, insurance company, or to any corporation.

(5) The distribution by a corporation of capital stock, bonds, or other securities to its stockholders or other security holders as the stock dividend or other distribution out of earnings or surplus; or the issue of securities by a corporation to security holders or creditors of such corporation in the process of a bona fide reorganization of such corporation made in good faith either in exchange for either or both the securities of such security holders or claims of such credi-



tors, or partly for cash and partly in exchange for the securities or claims of such security holders or creditors; or the issue of increased capital stock of a corporation sold or distributed by it entirely among its own stockholders.

(6) The transfer or exchange by or on account of one corporation to another corporation or to its stockholders of their or its own securities in connection with a proposed consolidation or merger of such corporations, or in connection with the change of par value stock to nonpar value stock or the exchange of outstanding shares for a greater or smaller number of shares.

(7) Subscriptions for shares or sales or negotiations for sales of shares of the capital stock in domestic corporations, when no expense is incurred, and no commission, compensation or remuneration is paid or given for, or in connection with, the sale or disposition of such securities.

(8) Subscriptions for shares of the capital stock of a domestic corporation prior to the incorporation thereof, when no expense is incurred, and no commission, compensation, or remuneration is paid or given for, or in connection with, the sale or disposition of such securities.

(9) The sale of securities to a registered dealer. (1925, c. 190, s. 4.)

#### **§ 3924 (m). Burden of proof as to such transactions.**

It shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment or proceeding laid or brought under this chapter in either a court of law or equity, or before the commissioner, in either a civil or criminal action or suit. The sale, unless the transaction is exempted from the operation of this chapter, of any security not exempt from the provisions of this chapter as hereinabove provided and not admitted to the record and recorded as hereinafter provided, shall be prima facie evidence of the violation of this chapter, and the burden of proof of any such exemption shall be upon the party claiming the benefit thereof. (1925, c. 190, s. 5.)

#### **§ 3924 (n). No security sold until recorded in register.**

No security not exempted under any of the provisions of section 3924(k), unless sold in one of the transactions exempt under the provisions of section 3924(1), shall be sold either directly or indirectly to any person within the State of North Carolina, unless and until said security shall have been admitted to record and recorded in the register of qualified securities, as hereinafter provided. (1925, c. 190, s. 6.)

#### **§ 3924 (o). Advertisement of securities.**

It shall be unlawful hereafter:

(1) To advertise in this State through or by means of any pro-

spectus, circular, price list, letter, order blank, newspaper, periodical, or otherwise, or

(2) To circulate or publish any newspaper, periodical, or either written or printed matter in which any advertisement in this section specified shall appear, or

(3) To circulate any prospectus, price list, order blanks, or other matter for the purpose of inducing or securing any subscription to or sale of any security or securities, not exempted under any of the provisions of section 3924(k), and not sold or to be sold in one of the transactions exempted under the provisions of section 3924(l), unless and until the requirements of section 3924(n) have been fully complied with and such advertising matter has been filed and approved by the commissioner. (1925, c. 190, s. 7.)

**§ 3924 (p). Application for authority to sell filed with commissioner.**

The commissioner shall receive and act upon applications to have securities admitted to record in such register of qualified securities and the commissioner may from time to time prescribe forms on which such applications shall be submitted. All applications shall be in writing and shall be signed and dated and sworn to and shall thereafter be filed with the commissioner. Such applications may be made to and filed with the commissioner either by the issuer of the securities in question or by any person desiring to sell the same in the State of North Carolina; the application must show in full detail the plan upon which the issuer of the securities in question or the person desiring to sell same proposes to transact business; copy of all applications for and forms of contracts, securities, bonds, or other instruments, which it or he proposes to make with or sell to its or his contributors; a statement which shall show the name, location, and head office of the issuer or person desiring to sell such securities, and an itemized statement of its financial condition, and the amount of its or his property and the liabilities, and such other information and in such form touching its or his affairs as the commissioner may require. If a foreign corporation, it or he shall also file with the commissioner a copy of the laws of such state, territory, or government under which it exists and is incorporated, and also a copy of its charter of its home state and certificate of the proper officer of such state that it has authority to do business therein, articles of incorporation, constitution, and by-laws, and all amendments thereof which have been made, and all other papers pertaining to its organization, and enter into an agreement as a condition precedent to being registered and licensed that stock or other offerings shall be sold only for cash or for notes or bonds payable to the company, and that said notes or bonds will not be sold or discounted with an endorsement "without recourse" or obligation not to be responsible for the same by the owner in a general sale or canvass, or by any agent on salary or commission.

Every note given for stock sold under the provisions of this act



must have appearing upon its face the following: "The consideration of this note is stock in the.....corporation, and this note is not negotiable under the negotiable instruments law."

The contract of subscription or of sale shall be in writing and shall contain a provision in the following language: "No sum shall be used for commissions, promotion and organization expenses on account of the sale of any securities offered for sale by this company in excess of five per centum of the amount actually paid upon separate subscriptions for such securities." (1925, c. 190, s. 8.)

### **§ 3924 (q). Fees to be paid.**

Each applicant for registration of securities shall, at the time of filing its application, pay to the commissioner, and the commissioner shall collect, a filing fee of fifty dollars plus the sum of two per centum of the par value of each issue of securities for which application for registration is filed. If any such securities have no par value, the price at which the applicant proposes to sell and issue the same to the public shall be deemed the par value thereof for the purpose of computing the fee to be paid by such applicant upon the filing of such application with the commissioner. (1925, c. 190, s. 9.)

### **§ 3924 (r). Consideration of application by commissioner.**

(1) As soon as practicable after the filing of an application the commissioner shall examine the application, statements and documents so filed; and if he deems it advisable, may make or cause to be made such inspection, examination, audit and investigation of the business and affairs of the issuer as he may deem necessary or advisable, which said inspection, examinations, audit and investigation shall be at the expense of the applicant. As a part of the aforesaid inspection, examination, audit and investigation the commissioner may, if he deems it necessary or advisable, cause an appraisal to be made of the property or assets of the issue, or parts thereof, where such property or assets does not include intangible assets; but wherever such property or assets of the issuer does include intangible assets as a material part thereof the commissioner shall cause an appraisal to be made of such intangible assets. Appraisals herein provided for may be made by three disinterested appraisers; and the commissioner is authorized to nominate and appoint such appraisers, who shall be paid not more than twenty-five dollars per day and their actual expenses while so employed, which compensation and expenses shall be paid by the applicant. The commissioner may require a bond sufficient to cover the expense of any such inspection, examination, audit or investigation as may be deemed necessary by the commissioner in connection with the application for or after the granting of such application for registration. Before admitting any security to record in such register of qualified securities the commissioner, or his deputy, or duly appointed appraisers, may require the applicant to furnish certain information as may in his or their

judgment be necessary for the commissioner to ascertain whether such securities should be so admitted to record pursuant to the provisions of this chapter; and the failure to furnish such requested information within such reasonable time, not exceeding three months, shall be considered as a withdrawal of the application for registration. The commissioner may require such verification of the information submitted in support of any application as he may deem necessary or desirable.

(2) The commissioner shall make a complete report of the inspection, investigation, examination, etc., of the business and affairs of the applicant above provided for, which record shall include a copy of the appraisal aforesaid, provided such an appraisal be made. (1925, c. 190, s. 10.)

### **§ 3924 (s). Hearing before commissioner.**

The commissioner shall, within fifteen days after such investigation, give the applicant a hearing if he so desires.

(1) If the commissioner shall act favorably upon the application, he shall issue an order directing that such securities be admitted to record in the register of qualified securities, hereinafter provided for. The commissioner shall keep a permanent record of all proceedings, findings, judgments and orders. In granting to an applicant the privilege of offering securities to the public in the State of North Carolina the commissioner may impose such reasonable conditions, either precedent or concurrent thereto, as in his judgment may be necessary or advisable. As one of such conditions precedent the commissioner may require that any such securities of the issuer, which have been or are to be issued for property or assets, either tangible or intangible, shall be deposited in escrow, under such terms as he may prescribe in each case, to the end that the owners of the securities, so issued in payment for property and so placed in escrow, shall in case of dissolution or insolvency of the issuer, not participate in the assets of such issuers until after the owners of all other securities have been paid in full.

The securities deposited under such escrow agreement shall be leased from such escrow agreement only at such time as the commissioner may deem just and equitable; and in any event such escrow securities shall be released therefrom when the issuer's earnings shall equal those prescribed in paragraph (i) of section three of this act for the same class of securities.

(2) If, however, the commissioner shall, in any case, believe from all the evidence before it—

(a) That the sale of such securities would work a fraud, deception or imposition upon the purchasers thereof; or

(b) That the articles of incorporation or association, declaration of trust, charter, constitution, by-laws, or other organization papers of the issuer, are unfair, unjust, inequitable, illegal or oppressive; or



(c) That the issuers or guarantors of such securities are insolvent, or are in failing circumstances, or are not trustworthy; or

(d) That the issuer's plan of business is unfair, inequitable, dishonest, or fraudulent; or

(e) That the issuer's literature or advertising is misleading or calculated to deceive purchasers or investors; or

(f) That the securities offered, or to be offered, issued or to be issued in payment for property or assets, either tangible or intangible, are so in excess of the reasonable value thereof as to indicate fraud or bad faith; or

(g) That the enterprise or business of either the issuers, or of the applicant, is unlawful or against public policy; or

(h) That the sale of such securities is a mere scheme of either the issuer or the applicant to dispose of worthless securities of no intrinsic value, at the expense of the purchasers of said securities—

Then the commissioner shall refuse to admit said securities to record in the register of qualified securities, or if such securities are admitted to record, such action may at any time thereafter be revoked by the commissioner for any of the reasons set out in this subsection and it shall thereafter be unlawful to sell such securities in this State or to advertise same, or to circulate any advertisements thereof.

(3) But, however, no securities shall be admitted to record in the register of qualified securities until the applicant or applicants therefor have entered into a bond for not less than one thousand dollars, nor more than one hundred thousand dollars. The amount of said bond shall be fixed by the commissioner in his order admitting said securities to record. Said bond shall be payable to the State of North Carolina and be conditioned upon the truth of the statements set forth in the application filed with the commissioner, also the truth of the statements set forth in all literature or advertising matter used or circulated in connection with the sale or offer of sale of such securities and of the evidence and other probative matter offered in connection with such application to the State official or officials, and upon compliance by said applicant and his agents with the provisions of this chapter. Said bond shall be made with a surety company authorized to do business in the State of North Carolina, and shall be filed with and approved by the commissioner. Any person who shall have a right of action against said bond shall bring suit thereon within two years after such right of action shall have accrued, and not thereafter. One or more recoveries upon such bond shall not vitiate the same; but no recoveries thereon shall ever exceed the full amount of such bond. Upon suits being filed in excess of the amount of such bonds, the commissioner shall require a new bond; and if same is not given within thirty days thereafter, he shall cancel the registration of the securities involved. (1925, c. 190, s. 11.)

**§ 3924 (t). No representation of endorsement by state.**

No person as dealer or agent shall represent any stock sold under the provisions of this chapter as being endorsed or recommended by the State of North Carolina or any officer thereof, nor shall make any mention whatever of recording or being admitted to record in the State of North Carolina. (1925, c. 190, s. 12.)

**§ 3924 (u). Register of qualified securities.**

The commissioner shall keep and maintain a permanent register of qualified securities and shall enter therein the names and amounts of all securities the privilege of offering which to the public in the State of North Carolina has been granted by the commissioner, and the date thereof, and such other data as the commissioner may deem proper. All securities admitted to record and recorded in such register shall be deemed, for the purpose of this chapter, to have been fully qualified for sale in the State of North Carolina, and thereafter any person may lawfully sell or offer for sale any part of such issue as recorded; subject, however, to the provisions of this chapter. Such register shall be open to inspection by the public. (1925, c. 190, s. 13.)

**§ 3924 (v). Report to commissioner.**

Every issuer whose securities have been admitted to record and recorded as herein provided, shall, during the offering of such securities, file within thirty days after the close of business on December thirty-first, March thirty-first, June thirtieth, and September thirtieth, of each year, and at such other times as may be required by the commissioner, a statement, verified under oath by some person having actual knowledge of the facts therein stated, setting forth, in such form as may be prescribed by the commissioner, the financial condition, the amount of assets and liabilities of such issuer on the above dates and such other information as said commissioner may require. It shall be unlawful for any issuer subject to the provisions of this chapter, who refuses or fails to comply with the provisions of this section, or for his agent or agents, to thereafter sell such securities in this State. (1925, c. 190, s. 14.)

**§ 3924 (w). Examination and examiners.**

The records and the business affairs of every company, or person, whose securities have been admitted to record in the register of qualified securities, shall be subject to examination and inspection by the commissioner or upon his direction by his assistants, accountants or examiners, at any time said commissioner may deem it advisable; and such company or person shall pay a fee for each of such examinations of not to exceed twenty-five dollars (\$25) for each day or fraction thereof, plus the actual traveling and hotel expenses of said commissioner, his assistant, accountant or examiner, that he is absent from the Capitol of the State for the purpose of making such examination. (1925, c. 190, s. 15.)



**§ 3924 (x). Complaints, investigations, findings of facts.**

The commissioner may, upon his own initiative or upon the complaint of any reasonable person, hold such public hearings or make or have made such special inspection, examination or investigation as he may deem necessary in connection with the promotion, sale or disposal in this State of any security, or securities, to determine whether the same constitutes a violation of law; and the said commissioner, his assistant or deputy shall have power and authority—

(1) To issue subpoenas and process compelling the attendance of any person and the production of any papers, records, or books relating to any matter of which the commissioner has jurisdiction under this chapter, and (2) to administer an oath to any person whose testimony may be required on such inspection, examination, or investigation. Upon the conclusion of any such hearing, inspection, examination or investigation the commissioner may make findings of fact concerning the matter or matters investigated. Such findings of fact shall be admissible in evidence in any suit or action, at law or in equity, instituted under any of the laws of this State, and shall be prima facie evidence of the truth of the matters therein found by said commissioner. (1925, c. 190, s. 16.)

**§ 3924 (y). Certain information and records open to inspection by public.**

All information received by the commissioner shall be kept open to public inspection at all reasonable hours, and the commissioner shall supply to the public upon request copies of any papers or record with the commissioner at charges equaling the cost of typing same; and the commissioner shall have power and authority to place in a separate file, not open to the public except on his special order, any information which he deems in justice to the person filing the same should not be made public. An exemplification of the record under the hand of the commissioner, or of his deputy, shall be good and sufficient evidence of any record made or entered by the commissioner. A certificate under the hand of the commissioner or his deputy or assistant, and the seal of the commissioner showing that the securities in question have not been recorded in the register of qualified securities, shall constitute prima facie evidence that such securities have not been qualified for sale pursuant to the provisions of this chapter, and shall be admissible in evidence in any proceeding, either civil or criminal, instituted under any of the laws or statutes of this State. (1925, c. 157, s. 17.)

**§ 3924 (z). Appeal.**

Any interested person aggrieved by any order of the commissioner, or by any refusal or failure of the commissioner to make an order under any of the provisions of this chapter, shall, upon written request directed to the commissioner, and within thirty days after such request has been filed with the said commissioner, be entitled to a hearing before the Corporation Commission as a body. The com-

mission shall, within ten days after such hearing, rule upon the subject-matter of such hearing. Any person, being dissatisfied with any findings, rulings, order or judgment of the commission may, within thirty days after the making and issuance thereof, commence a suit in the Superior Court of Wake County, North Carolina, against the commission as defendant, to vacate and set aside said findings, ruling, or order on the ground that same is unjust and unreasonable. The rules of pleading and procedure in such suit shall be the same as are provided by law for the trial of other actions in the Superior Court of this State, and on the hearing the judge of said Superior Court may set aside, modify, or confirm said finding, ruling, order or judgment as the evidence and the rules of law or equity may require. Appeals may be taken from the decision of the Superior Court to the Supreme Court by either party in the same manner as is provided by law in other civil cases, but the commission may appeal without bond. Pending any such appeal, the said findings, rulings, orders, and judgments of the commission shall be prima facie evidence that they are just and reasonable and that the facts found are true, and shall remain in full force and effect; if no such suit be brought within said thirty days, said finding, ruling, order or judgment shall become final and binding. (1925, c. 190, s. 18.)

**§ 3924 (aa). Dealers and salesmen; registration.**

No dealer or salesman shall carry on business in the State of North Carolina as such dealer or salesman, or sell securities, including any securities exempted under the provisions of section 3924 (k), unless he has been registered as dealer or salesman in the office of the commissioner pursuant to the provisions of this section. Every applicant for registration shall file in the office of the commissioner, pursuant to the provisions of this section, an application in writing, duly signed and sworn to, in such form as the commissioner may prescribe, giving particulars concerning the business reputation of the applicant. The commissioner in his discretion may require that the applicant shall have been a bona fide resident of the State of North Carolina for a term not to exceed two years prior to the filing of the application. The names and addresses of all persons approved for registration as dealers or salesmen shall be recorded in a register of dealers and salesmen kept in the office of the commissioner, which shall be open to public inspection. Every registration under this section shall expire on the thirty-first day of March in each year, but the same may be renewed. The fee for such registration and for each annual renewal thereof shall be fifty dollars in the case of dealers, and ten dollars in the case of salesmen. Registration may be refused or a registration granted may be canceled by the commissioner if, after reasonable notice and a hearing, the commissioner determines that such applicant or dealer or salesman so registered (1) has violated any provision of this chapter or any regulation made hereunder; or (2) has made a material false statement in the application for registration; or (3) has been guilty of a fraud-



ulent act in connection with any sale of securities in the State of North Carolina, or has been or is engaged in making fictitious or pretended sales or purchases of any such securities or has been engaged in any practice or transaction or course of business relating to the purchase or sale of securities which is fraudulent or in violation of law; or (4) has demonstrated his unworthiness to transact the business of dealer or salesman. It shall be sufficient cause for refusal or cancellation of registration in the case of a partnership, corporation or unincorporated association or trust estate, if any member of the partnership, or any officer or director of the corporation, association or trust estate has been guilty of any act or omission which would be cause for refusing or canceling the registration of an individual dealer or salesman. The word "dealer" as used in this section shall include every person, other than a salesman, who in the State of North Carolina engages, either for all or part of his time, directly or through an agent, in the business of offering for sale, selling or otherwise dealing in securities, including securities exempted under the provisions of section three, or of purchasing or otherwise acquiring such securities from another person with the purpose of reselling them or of offering them for sale to the public for a commission or at a profit, or who deals in future on market quotations of prices or values of any securities, or accepts margins on prices or values of said securities. The word "salesman" as used in the section shall include every person employed, appointed or authorized by another person to sell securities in any manner in the State of North Carolina. No person shall be registered as a salesman except upon the application of the person on whose behalf such salesman is to act. It shall be unlawful for any person required to register under the provisions of this section to sell any security to any person in the State of North Carolina without having registered, or after such registration has expired or been canceled and not renewed: *Provided, however*, that employees of a company, securities of which are exempted under the provisions of section 3924 (k), may sell or solicit or negotiate for the sale or purchase of any such securities of such company in the territory served by such company or in which it operates without being considered as salesmen or dealers within the meaning of this chapter and without being required to register under its provision. (1925, c. 190, s. 19.)

### **§ 3924 (bb). Assistants, clerks, etc., employment of.**

It shall be the duty of the commissioner to administer and enforce the provisions of this chapter. The commissioner shall appoint an assistant who shall have special charge of the administration and enforcement of this chapter under the direction and authority of the commissioner. He shall keep all records and generally perform such duties as the commissioner may direct; and for his services he shall be paid such salary as may be fixed by the commission. The commissioner may appoint such clerks and other assistants as may from

time to time be needed, and may likewise fix their salaries or compensation, subject to the approval of the commission. (1925, c. 190, s. 20.)

**§ 3924 (cc). Fees paid into State treasury, expenses of administration.**

All fees herein provided for shall be collected by the commissioner and shall be paid over to the State Treasurer to go into the general fund; as well as all fees, per diems, expenses, etc., of appraisers, assistants, and investigators as herein provided, and all other expenses and fees required by this chapter. The commissioner may from time to time employ special counsel for the purpose of enforcing and carrying out the provisions of this chapter. All expenses of the administration of this chapter, including salaries, special council fees, clerk hire, postage, printing, stationery and the like, shall be paid out of available funds in the treasury on the Auditor's warrant for the payment of bills itemized and certified to by the commissioner. (1925, c. 190, s. 21.)

**§ 3924 (dd). When sales made in violation of this chapter voidable.**

Every sale or contract for sale of any securities made in violation of the provisions of this chapter shall be voidable at the election of the purchaser thereof; and every person making such sale or contract for sale, and every agent of or for such seller who shall have participated or aided in any way in making such sale, knowing same to be in violation of this chapter, shall be jointly and severally liable to such purchaser, upon tender of said securities or said contract to the seller for the full amount paid by said purchaser, together with interest and all taxable court costs in any action brought under this section. No action shall be brought under this section after two years from the date of such sale or contract for sale. (1925, c. 190, s. 22.)

**§ 3924 (ee). Punishment for violation.**

Any person who violates any of the provisions of this chapter shall be punished by a fine of not less than two hundred nor more than five thousand dollars, or by imprisonment in jail or work on the roads for not exceeding two years, or by both such fine and imprisonment. (1925, c. 190, s. 23.)

**§ 3924 (ff). Constitutionality.**

If any clause, sentence, paragraph, or part of this chapter shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of said chapter, but shall be confined in its operation to the cause, sentence, paragraph or part thereof directly involved in the controversy in which said judgment shall have been rendered. (1925, c. 190, s. 24.)



**§ 3924 (gg). Repeal; proviso.**

All laws and clauses of laws in conflict with this chapter are hereby repealed: *Provided, however*, that this clause shall not be construed to prevent the prosecution of any offenses committed before the passage of this chapter against any law or laws heretofore in force, but all such crimes and offenses committed before the ratification of this chapter may be prosecuted to final judgment under the laws in force at the time of the commission of such crimes or offenses. This chapter shall not affect any right accrued or liability incurred prior to the ratification of this chapter. (1925, c. 190, s. 25.)

**Editor's Note.**—The act codified in this chapter was ratified April 1, 1925.

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**CHAPTER 72****SHERIFF****ART. 3. DUTIES OF SHERIFF****§ 3936. Execute process; penalty for false return.**

**Method of Recovering Penalty Exclusive.** — The method by which a sheriff may be amerced for unlawfully failing to execute a warrant it was his duty to serve, as prescribed by this section, is alone to be followed in an action for the penalty brought thereunder. *Walker v. Odom*, 185 N. C. 557, 118 S. E. 2.

The court may not regard an independent action as a motion in the original cause when the latter is not before it; and where the sheriff is liable for the penalty prescribed by this section, for failure to serve a warrant in an action before a justice of the peace, and the plaintiff brings an independent action for the recovery of the penalty before another justice, from whose judgment the defendant has appealed, and a trial de novo had in the Superior Court, it is error for the trial judge to regard the summons and complaint in the independent action as a motion in the cause under this section, and proceed with the trial accordingly. *Walker v. Odom*, 185 N. C. 557, 118 S. E. 2.

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**CHAPTER 75****SUNDAYS AND HOLIDAYS****§ 3957. Local: Sale of articles on Sunday in Forsyth and Johnson.**

No person, firm or corporation in Forsyth county [or Johnson county] shall expose for sale, sell or offer for sale on Sunday any goods, wares or merchandise within one mile of the corporate limits of any incorporated town or city; and no store, shop, or other place of business in which goods, wares or merchandise of any kind are kept for sale shall keep open doors from twelve o'clock Saturday night until twelve o'clock Sunday night: *Provided*, that this section

shall not be construed to apply to hotels or boarding-houses, or to restaurants or cafés furnishing meals to actual guests, where the same are not otherwise prohibited by law from keeping open on Sunday: *Provided further*, that drug stores, with licensed pharmacists, may be kept open for the sale of goods to be used for medical or surgical purposes, and for the sale of cigars and tobacco; and cigar stands and news stands may sell cigars, tobacco and newspapers: *Provided further*, that ice dealers and dairies may remain open for the sale and delivery of ice and dairy products. Nothing in this section shall be construed to prohibit livery stables or garages from operating on Sunday or to prohibit publication and sale of newspapers. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (P. L. 1917, c. 597; 1925, c. 185.)

**Constitutionality.**—A statute which prohibits as a criminal offense the exposing of goods, merchandise, etc., for sale, and keeping open of a store on Sunday, except for the sale of drugs, etc., is constitutional and valid. *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394.

**Restaurants or Cafes.** — Under this section prohibiting shops, stores, etc., from being kept open on Sunday for the sale of any goods, wares or merchandise within four miles of any incorporated city or town within the county, providing that the act shall not apply to hotels or boarding houses, or restaurants or cafes furnishing meals to actual guests, when not otherwise prohibited by law from being kept open on Sunday, it was held, that the words “restaurants or cafes” are substantially synonymous, and a place where stools and counters only were used for the service to customers of lunches, “weiners” and egg sandwiches, comes within the definition of the exception; and the sale of these not being unlawful, the fact that the place was called a “weiner joint” does not render it so. *State v. Shoaf*, 179 N. C. 744, 102 S. E. 705.

**Sale of Food in Store.**—An act which makes it a crime to expose for sale or selling, or offering for sale, on Sunday, any goods, etc., within four miles of an incorporated city, etc., and in the same sentence, divided by a semicolon, prohibits the keeping open of any store, etc., on Sunday, does not permit the keeping open of the store for the sole purpose of running a restaurant therein on Sunday, for the sale of food, etc., though the latter may not be of itself unlawful, when conducted in a separate place of business. *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394.

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## CHAPTER 76

### SURETYSHIP

#### § 3963. Summary remedy of surety against principal.

**Assignment of Right by Surety.**—Where one of two defendants has paid a joint judgment upon a note against them both, and has the judgment assigned to another for his use, who brings action to recover against the other judgment debtor, he may, as between themselves, show that the defendant in the second action was the principal payee, and that he, the plaintiff, was an indorser, though not pleaded in the original action, and recover the full amount of the judgment he has paid, the action



being, in substance, one by the surety on the note to recover against the principle thereon. *Haywood v. Russell*, 182 N. C. 711, 110 S. E. 81.

### § 3965. Contribution among sureties.

**Accommodation Maker and Endorser.**—An accommodation maker who pays a note may recover contribution for an accommodation endorser of the note where they intended to become co-sureties. *Gillam v. Walker*, 189 N. C. 189, 126 S. E. 424.

### § 3967. Surety may notify creditor to sue.

**Reasonable Compliance.**—The requirements of this section are reasonably complied with when the holder of a negotiable note, after receiving notice in accordance with this section within thirty days causes the maker to be a party defendant, and it is made to appear that he is a non-resident. *Taylor v. Bridger*, 185 N. C. 85, 116 S. E. 94.

**When Section Inapplicable.**—Where there is an agreement in a negotiable note that the endorser will continue to be bound notwithstanding an extension of time granted to the maker, the endorser cannot avail themselves of the provisions of this section, when the maker is a nonresident, demand for payment after dishonor has been made upon the resident endorser, defendant in the action, and they have delayed to give the statutory notice until after action commenced. *Taylor v. Bridger*, 185 N. C. 85, 116 S. E. 94.

### § 3970 (a). Cancellation of judgment as to surety.

Whenever a judgment shall be rendered in any court in accordance with the provisions of section thirty-nine hundred and sixty-one (3961) and the surety, endorser or other person shown in said judgment to be secondarily liable thereon and having the rights as by this chapter prescribed against the person or persons primarily liable, and the surety, endorser or other person so shown in the judgment to be secondarily liable, shall pay the said judgment or shall be compelled to pay an execution issued thereon and such fact shall appear to the satisfaction of the clerk of the Superior Court of the county in which the said judgment is rendered and docketed, such judgment shall be canceled as to said surety, endorser or other person secondarily liable and shall cease to be a lien upon his real estate and other property, but such cancellation shall not have the force and effect nor operate as a cancellation and discharge of the judgment as to any other person against whom the said judgment shall be rendered and the person so paying the said judgment shall have all the rights given to a surety who has been compelled to pay a judgment against the principal debtor and cosureties which are given in this chapter, notwithstanding the cancellation of the said judgment as herein provided for. (1925, c. 38.)

## CHAPTER 78

## TRUSTEES

## ART. 5. CHARITABLE TRUSTS

**§ 4035 (a). Indefiniteness; title in trustee; vacancies.**

No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the Superior Court of the proper county shall appoint a trustee or trustees, pursuant to section four thousand and twenty-three, of the Consolidated Statutes of North Carolina, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument. (1925, c. 264, s. 1.)

**§ 4035 (b). Trusts created in other states valid.**

Every such religious, educational or charitable trust created by any person domiciled in another state, which shall be valid under the laws of the state of the domicile of such creator or donor, shall be deemed and held in all respects valid under the laws of this State, even though one or more of the trustees named in the instrument creating said trust shall be domiciled in another state or one or more of the beneficiaries named in said trust shall reside or be located in a foreign state. (1925, c. 264, s. 2.)

**§ 4035 (c). Application of section 4035 (b).**

Section 4035 (b) shall apply to all trusts heretofore or hereafter created in which one or more of the beneficiaries or objects of such trust shall reside or be located in this State. (1925, c. 264, s. 3.)



## CHAPTER 79

## WAREHOUSE RECEIPTS

## ART. 1. GENERAL PROVISIONS

## § 4037. Terms defined.

**What Constitutes Warehousemen.**—It matters not if a concern is a person or partnership. If the concern is engaged in the business and goods are stored for profit, this section applies. It matters not if the concern stores its own and also the goods of others. The receipt issued by the concern under consideration terms itself "warehouse receipt" and shows on the face that the goods are stored for profit; it gives the "storage rates." The receipts and admitted evidence shows that the concerns are warehousemen and the concerns dealt with the public as such. *Webb & Co. v. Friedberg*, 189 N. C. 166, 126 S. E. 508.

## ART. 4. NEGOTIATION AND TRANSFER OF RECEIPTS

## § 4087. Rights of bona fide holder not affected by fraud.

**Fraudulent Negotiation by Superintendent.**—Warehouse receipts issued under § 4925(e), and upon being returned endorsed, negotiated by the superintendent of the warehouse as collateral for a loan to himself, in breach of his duty to cancel them, are directly within the force of this section. *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 126 S. E. 316.

## CHAPTER 80

## WIDOWS

## ART. 1. DISSENT FROM WILL

## § 4098. Widow's interest not liable for husband's debts.

Where a widow takes under a will a substitute for dower, the land may be allotted by the parties or by the statutory method applicable to dower. *In re Freeman's Heirs* (N. C.), 128 S. E. 404.

## ART. 2. DOWER

## § 4099. Who entitled to dower.

**Definition.**—Dower is the life estate to which every married woman is entitled, upon the death of her husband intestate, or in case she shall dissent from his will, to one-third in value of all the lands, tenements and hereditaments, both legal and equitable, of which her husband was the beneficially seized, in law or in fact, at any time during coverture, in which the issue, had she any, would have inherited as heir to her husband; and this right is not subject to the claims of his creditors. *Virginia-Carolina Chemical Co. v. Walston*, 187 N. C. 817, 123 S. E. 196.

## § 4103. Conveyance of home site without wife's signature.

**In General.**—In *Southern State Bank v. Summer*, 188 N. C. 687, 688, 125 S. E. 489, the Court said: "The facts of the present record do not call

for an interpretation of this section which is not altogether free from difficulty, and we refrain from a discussion of it. Its meaning is by no means clear. The value of the 'home site' is not fixed by the statute. It is not certain as to whether it is intended to be in addition to, or included within, the homestead right. Nothing is said as to whether it is superior to the right of heirs or the claims of creditors. It has been suggested that the statute may apply, and probably was intended to apply only as against those claiming under a deed from the husband without his wife's proper joinder. We leave its interpretation for future consideration."

Under the facts of this appeal it appears that a mortgage given by the husband was insufficient to pass the interest of the wife in his lands for insufficiency of her probate and that the court below, upon her motion in the present case, dissolved a temporary order as to her inchoate right of dower, but continued it with respect to her husband's "home site," which had previously been included in another action to which she was not a party in the dower allotted to her mother-in-law. There was no evidence as to when her husband had acquired the title to the land, or when he married the appellant. It was held that the appellant had no just ground to complain of the action of the court below, and the consideration of this section was not involved on the appeal. *Southern State Bank v. Summer*, 188 N. C. 687, 125 S. E. 489.

**Homestead Distinguished.** — Homestead exemption should not be confused with the wife's interest under this section. The wife's interest in the husband's "home site" exists by this section and a different principle applies as to a conveyance without her valid execution. *Johnson v. Leavitt*, 188 N. C. 682, 125 S. E. 490.

### ART. 3. ALLOTMENT OF DOWER

#### § 4104. By agreement between widow and heir.

**Method Exclusive.**—The method of allotting dower presented by this and the following sections is exclusive. In *re Freeman's Heirs* (N. C.), 128 S. E. 404.

### ART. 4. YEAR'S ALLOWANCE

#### § 4112. From what property assigned.

Such allowance shall be assigned from the crop, stock and provisions [or any personal property] of the deceased in his possession at the time of his death, if there be a sufficiency thereof in value; and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased. (Rev., s. 3095; Code, s. 2117; 1868-9, c. 93, s. 9; 1925, c. 92.)

#### § 4125. Duty of commissioners; amount of allowance.

**Maximum Amount.**—Under this section the maximum amount is not one-half of the sum of the annual income for the three preceding years, but one-half of one year's income based on that of the three preceding years. *Holland v. Henson* (N. C.), 128 S. E. 145.



## CHAPTER 81

## WILLS

## ART. 1. EXECUTION OF WILL

## § 4131. Formal execution.

See note of Whitten *v.* Peace under § 4152.

**Sufficiency of Signatures.**—It is not necessary that the testatrix should have signed the paper as her will, in the presence of the witnesses, provided she afterwards acknowledged it before them. In *re Fuller's Will*, 189 N. C. 509, 127 S. E. 549, 550.

Upon the trial of an issue of *devisavit vel non* submitted in accordance with the statutes appertaining to the subject, and authoritative decisions construing the same, an instruction is correct upon relevant evidence that it was not required that the witnesses to the will should sign in the presence of each other, or that the will should be manually signed by the alleged testatrix if her name was signed thereto by some one in her presence, by her direction, or if such a signature was acknowledged by her as her signature to the instrument presented as her last will. In *re Will of Johnson*, 182 N. C. 522, 109 S. E. 373.

**Holograph Wills — Necessity of Animus Testandi.**—Upon the issue of *devisavit vel non* it is necessary that the paper-writing offered as a holograph will show that it was the maker's intention that it should be so regarded, from the character of the instrument itself and the circumstances under which it was made, and where the *animus testandi* thus appears as doubtful or ambiguous, the question is one for the jury. In *re Will of Harrison*, 183 N. C. 457, 111 S. E. 867.

Where, upon the trial of *devisavit vel non*, the validity of a paperwriting as a holograph will is in question, a negative finding by the jury to an issue as to whether the deceased "wrote all of said paper-writing propounded with the intent that it should operate as her last will and testament, and was it found, after her death, among her valuable papers and effects?" is in effect a finding either that the paper was not written *animus testandi*, or was not found among valuable papers and effects of the decedent, or both, either one of which is essential to the validity of the writing as a holograph will. In *re Will of Harrison*, 183 N. C. 457, 111 S. E. 867.

**Same—Letter as Will.**—A letter written by the deceased to his brother, signed by him "Brother Alex," just before the deceased had gone to a hospital for treatment, saying "Brother Richard, take good care of yourself and stay with William at the store. I am going to the hospital on account of not feeling well. I hope God nothing happens, but if it does, everything is yours. Got some money in the bank, but don't know how much we owe on house ..... I hope in a few days I will come back," etc., indicates the writer's present intention to dispose of his property, and is provable as his holograph will, when our statute has been complied with relating thereto. *Wise v. Short*, 181 N. C. 320, 107 S. E. 124.

## ART. 2. REVOCATION OF WILL

## § 4133. Revocation by writing or by cancellation or destruction.

**Material Alteration Necessary.**—In order to a revocation of a will, in whole or in part, under the provisions of this section there must not only exist the intent of the testator to cancel, but it must be accompanied by the physical act of cancellation; and while it is not required that the words

should be entirely effaced where the cancellation is in part, so as to make the same illegible, the portion erased must be of such significance as to effect a material alteration in the meaning of the will or the clause of the will that is challenged on the issue. In *re Love's Will*, 186 N. C. 714, 120 S. E. 479.

Where the primary or controlling clause of a will remains unaltered by the obliteration by the testator of words therein and the unobliterated words remaining are sufficient to carry the designated property to the devisee, it will not amount to a revocation within the intent and meaning of this section; nor will the obliteration of the name of another beneficiary be sufficient as to him, when it appears that the intent of the revocation by the testator was dependent upon the successful revocation of a principal devise wherein the erasures were insufficient to effectuate a legal cancellation. In *re Love's Will*, 186 N. C. 714, 120 S. E. 479.

**Presumption as to Second Will.**—A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any of the other methods prescribed by law; but the mere fact that a second will was made, although it purports to be the last, does not create a presumption that it revokes or is inconsistent with one of a prior date. In *re Wolfe's Will*, 185 N. C. 563, 565, 117 S. E. 804. In this case it was held that where a testator devised a certain part of his lands to L., and by a later will gave his effects to his brothers and sisters, the two wills were not inconsistent and the latter did not revoke the former. Ed. Note.

### § 4134. Revocation by marriage; exception.

**Evidence of Prior Will.**—Our statute revokes any will made before marriage, and evidence that a will had been made prior thereto is not evidence of undue influence in the procurement of a subsequent will made in favor of the wife of the deceased. In *re Will of Bradford*, 183 N. C. 4, 110 S. E. 586.

## ART. 3. WITNESSES TO WILL

### § 4138. Beneficiary competent; interest rendered void.

One who is a beneficiary under a holograph will may testify to such competent, relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In *re Will of Westfeldt*, 188 N. C. 702, 125 S. E. 531.

## ART. 4. PROBATE OF WILL

### § 4144. Manner of probate.

See notes to § 4131.

**Holograph Wills—Sufficiency of Evidence.** — Evidence that a paper-writing purporting to be the last will and testament of the deceased, wholly written and signed by her, was found among her valuable papers after her death, in a desk where she kept her business papers, and those she desired to keep for their sentimental value to herself, and transferred after her death to her trunk where they were found, is held sufficient, under the circumstances of this case to sustain the verdict of the jury and deny the caveator's motion as of nonsuit. In *re Will of Westfeldt*, 188 N. C. 702, 125 S. E. 531.

There being evidence upon the trial of the issue of *devisavit vel non* that the deceased had sufficient mental capacity to execute the paper-writings being propounded as her will, that she was aware of the nature,



extent and value of the property, and those whom she wished to have it, etc., the issue was properly submitted to the jury. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

### **§ 4145. Probate conclusive until vacated.**

**Applied in** *Citizens Bank, etc., Co. v. Dustowe*, 188 N. C. 777, 125 S. E. 546; *Newburn v. Leigh*, 184 N. C. 166, 113 S. E. 674.

### **§ 4152. Certified copy of will of non-resident recorded.**

**Effect of Affidavit Attached to Will.**—Where a nonresident testator has left a will disposing of certain lands in this State, including his wife as a beneficiary, with two witnesses required by section 4131, an affidavit he has attached thereto as a part thereof, stating that none of his wife's money had been used in his acquisition of the lands disposed of, signed without witness, cannot alone be construed as showing an *animus testandi*, or as having the effect of passing thereunder any of the testator's land here situated under the will to which it was attached: *Semble*, a will properly attested and otherwise sufficient under the laws of another State would operate to pass title to lands situated here. *Whitten v. Peace*, 188 N. C. 298, 124 S. E. 571.

### **§ 4156. Local: Validating probate of certain old wills.**

In all cases where wills and testaments were executed prior to the first day of January, one thousand eight hundred and ninety-nine, and which appears to have two or more subscribing witnesses thereto, and such wills and testaments were admitted to probate in jurisdictions outside of North Carolina upon the proof of one witness, and such wills, or exemplified copies thereof, were presented to the clerk of the superior court in any county in this state where the makers thereof owned property, and by such clerk recorded in the records of wills for his county, said wills and testaments, or exemplified copies thereof, so recorded, if otherwise sufficient, shall have the effect to pass the title to the real and personal property therein devised and bequeathed, to the same extent and as completely as if the execution of such wills had been proven by two subscribing witnesses thereto in the manner provided by the laws of this state. And where such wills and testaments were duly admitted to probate in jurisdictions outside of North Carolina, upon proof of one witness, and in cases where parties interested desire to have them recorded in this state, where they have not already been so recorded, the clerk of the superior court of any county in North Carolina, when such wills or exemplified copies thereof are duly authenticated and presented to him by parties interested, shall receive and record the same; and if the same are otherwise sufficient such wills shall have the effect to pass the title to all real and personal property therein devised and bequeathed, to the same extent and as completely as if the execution of such wills had been proven by two subscribing witnesses thereto in the manner provided by the laws of this state. This section shall not have the effect to invalidate the title of any person owning any land embraced in the provisions of any such will which was valid prior to the tenth day of March, one thousand nine hundred and nineteen. This section shall not apply to suits pending on the tenth

day of March, one thousand nine hundred and nineteen, and nothing herein shall be construed to prevent such wills from being impeached for fraud. This section shall only apply to Henderson, Transylvania, [Halifax,] Wake and Cleveland counties. (1919, c. 250; Ex. Sess. 1920, c. 63; 1924, c. 10.)

#### ART. 5. CAVEAT TO WILL

### § 4158. When and by whom caveat filed.

At the time of application for probate of any will, and the probate thereof in common form, or at any time within seven years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: *Provided*, that if any person entitled to file a caveat be within the age of twenty-one years, [or a married woman where the caveat is filed prior to the first day of January, 1926] or insane, or imprisoned, then such person may file a caveat within three days after the removal of such disability. (Rev., s. 3135; Code, s. 2158; C. C. P., s. 446; 1907, c. 862; 1925, c. 81.)

**In General.**—By this section, the legislature recognized that it is against the sound public policy to allow probate of wills and settlements of property rights thereunder to be left open to such uncertainties for an indefinite length of time. In re Will of Johnson, 182 N. C. 522, 109 S. E. 373.

Proceedings to caveat a will are in rem involving the rights of the beneficiaries as named in the will, and those of the opposing heirs at law or next of kin depending upon the answer to the issues of *devisavit vel non*, and there being no parties, strictly speaking, upon whom a judgment as of nonsuit may be taken, the issue should be tried in the due course and practice of the court, and a motion of nonsuit should be denied. In re Will of Westfeldt, 188 N. C. 702, 125 S. E. 531.

**Time Limit.**—The effect of the amendment of this section in 1907 was to limit the time in which a caveat to a will may be filed, and does not affect the time within that period when the same may be done, or the further proceedings under the statute applicable. In re Little's Will, 187 N. C. 177, 121 S. E. 453.

One who is authorized by law to caveat a will is not required to await the falling-in of an outstanding life estate, and such time is not excluded from the computation of period limit in which a caveat to a will may be filed. In re Will of Witherington, 186 N. C. 152, 119 S. E. 11.

**Applicable Equally to Women.**—Since the enactment of later statutes fully emancipating a feme covert from her disabilities, the provisions of this section barring the right to caveat a will after seven years, with certain exceptions, apply equally to her. In re Will of Witherington, 186 N. C. 152, 119 S. E. 11.

Where a caveat to a will is duly filed, with the required bond, etc., at the same time the paper-writing is offered for probate, it is required of the clerk to transfer the proceedings to the civil-issue docket for the trial of the issue of *devisavit vel non*, and all further steps are stayed in the matter until its final adjudication, except such as may be necessary for the preservation of the estate. In re Little's Will, 187 N. C. 177, 121 S. E. 453.



**§ 4161. Caveat suspends proceedings under will.**

See notes to *Bank v. Dustowe* under § 4145, and *In re Little's Will*, under § 4158.

**ART. 6. CONSTRUCTION OF WILL****§ 4162. Devise presumed to be in fee.**

**In General.**—In its interpretation, a will will be given effect in accordance with its intent as gathered from the entire instrument, unless in violation of law; and where the will is sufficiently ambiguous to permit of construction, there is (1) a presumption against intestacy; (2) the first taker is to be considered as the primary object of the testator's bounty; and, by statute in this State, a devise of real property is to be construed in fee, unless in plain and express words it is shown or plainly intended by the will or some part thereof, that the testator intended to convey an estate of less dignity. *Smith v. Creech*, 186 N. C. 187, 119 S. E. 3.

**Construction of "Issue."**—The intention of the testator as gathered from the terms of the will control as to whether the word "issue" shall mean "children" and slight indications thereof may be sufficient to show his intention that they should have a correlative meaning; and where the devisee was a child of the testator and the disposition of other lands to his other children indicates that he meant "children" by the word "issue," that meaning will be given; and a devise to testator's daughter M. during her natural life and after her death, to her issue and her heirs, the deed of M. and her children, assuming that she will not thereafter have other children, will convey a fee simple title to their grantee. *Etheridge v. Eagle-House Realty Co.*, 179 N. C. 407, 102 S. E. 609.

**Construction of "Lend and Loaned."**—The word "lend" applying to lands and used in a will, will be constructed as "give" or "devise," unless it is manifest from the terms of the will, that the testator did not intend an estate therein to pass. *Jarman v. Day*, 179 N. C. 318, 102 S. E. 402.

An estate "loaned" to testator's daughter R. during her natural life and at her death "I lend all of the" designated land "to the lawful heirs of her body, and to the lawful begotten heirs of their bodies if any," standing alone, would convey the fee simple title, but with the further expression, "in case she should die leaving no lawful issue of her body then I give all the above described land to my son J., and his lawful heirs," the estate is defeasible in the event of the death of R. "leaving no lawful issue of her body," the contingency being the death of the deviser, but that of R. without leaving "lawful issue of her body," etc. *Jarman v. Day*, 179 N. C. 318, 102 S. E. 402.

**Trust in Devised Lands.**—For precatory words used in a will to be regarded as mandatory to create a trust in lands devised, the intention of the testator to that effect must clearly appear by interpretation of the instrument, for otherwise these words must be given the ordinary significance of those of that character, both under our modern decisions and this section providing that a devise of land shall be construed to be in fee, unless the terms of the will clearly shows the testator's intent to pass an estate of less dignity. *Springs v. Springs*, 182 N. C. 484, 109 S. E. 839.

**Same—Letter Insufficient.**—Where a holograph will, unnecessarily witnessed and bearing a seal after the testator's signature, in positive terms gives all of the testator's real property to his sister, to be held by a designated person in trust for her until her twenty-third birthday, and the testator has written a letter to her (without attestation of seal, but on the same sheet of paper) expressing a wish that when she should become aware of the contents of his will, she would make one, leaving "all your property" to a certain nephew, so that in the event of her dying without children the nephew should have it, and in case of her marriage she could

destroy her will, it was held, that the words in the latter were precatory and not mandatory; and should it be considered a part of the will, which is at least doubtful, and the clerk has admitted the whole to probate, the words employed in the letter are insufficient to evidence the intent of the testator to impose a trust thereby upon the unqualified gift in the writing he declared to be his will. *Spring v. Springs*, 182 N. C. 484, 109 S. E. 839.

**Devise of Last Surviving Tenant in Common.**—Several sisters, tenants in common of land, devised their interest to each other without residuary clause, all to the effect that should the testatrix's sisters, or any one of them, marry, to those remaining unmarried, and so on to the last single sister; and should all of them marry, then the estate to be equally divided between the surviving sisters or their lawfully begotten heirs. All of them died without leaving issue, and the will of the last surviving sister devised the lands to her brother, with direction to pay certain specific bequests, who paid the same and mortgaged the land to the plaintiff in this section, it was held, that the intent of the wills was to convey the fee simple in the lands to the sisters, defeasible as to each upon her marriage, and so on to the last survivor, and her devise to her brother was of a fee-simple title and subject to his mortgage. *Smith v. Creech*, 186 N. C. 187, 119 S. E. 3.

**Devise With Full Power of Disposal.**—A devise to a husband with full power of its disposal, but on certain conditions any part undisposed of by him to go to a nephew, vests a fee simple in the husband. *Roane v. Robinson*, 189 N. C. 628, 127 S. E. 626.

A devise to the wife of all of the testator's property, real, personal or mixed, with full management and control thereof during her natural life; that she shall enjoy the full benefit thereof with power to sell and dispose of it at her discretion, and that it was the testators' will and desire that she shall devise whatever property she has not thus disposed of during her natural life, or the proceeds thereof, to the person or persons who have been the "kindest to us in aiding and comforting us in our old age," whether kinsman or stranger, it was held, that under the provisions of this section the wife acquired a fee-simple title, and there being no definite person or persons, in whose favor a trust could be created, upon the death of the wife, intestate, the property or estate descends to her heirs at law, or legal representatives. *Weaver v. Kirby*, 186 N. C. 387, 119 S. E. 564.

**Devise for "Use and Benefit without Let or Hindrance."**—Where testator left property in trust with power in his wife to demand that trustee turn over property to her "for her own use and benefit without let or hindrance," upon such demand and compliance therewith, the wife takes and can convey a fee simple, notwithstanding a further provision in the will that a third person should take a life estate in property remaining in the hands of trustee at the wife's death. *O'Quinn v. Crane*, 189 N. C. 97, 126 S. E. 174.

## § 4164. What property passes by will.

**Contingent Remainder.**—Upon a conveyance in trust to the sole use and benefit of the wife of H. during her life, and at her death to the surviving children of her marriage with H., and in case she should die leaving no child, "then in that case the property in this deed conveyed shall be held and owned by her husband," H., and H. has died leaving his wife surviving without child of the marriage, and by will has given her "all the property of every description, both real and personal, that he may die possessed of," it was held that under this section the wife was entitled to an equitable life estate in the lands under the deed; to a contingent interest in fee under her husband's will, and the trust having become a passive one, both the legal and equitable title united in her, and her conveyance passed the fee-simple title to the lands. *Hollowell v. Manly*, 179 N. C. 262, 102 S. E. 386.



### § 4168. Gifts to children dying before testator pass to their issue.

**In General.**—A devise to a son of a portion of the testator's land, who died during the life of the testator, leaving children who survive the testator, does not lapse, but goes to his children, the grandchildren of the testator, at the latter's death, under the provisions of this section no contrary intent of the testator appearing by a construction of his will. *Askew v. Dildy*, 188 N. C. 147, 124 S. E. 124.

### § 4169. After-born children share in testator's estate.

**In General.**—Under this section where there is a devise to a wife "to do with as she thinks best for herself and the children," and a child is born two months after the testator's death, such child is not entitled to a share in the estate but is provided for as one of "the children" under the will in view of rule 7, § 1654. *Rowls v. Durham Realty, etc., Co.*, 189 N. C. 368, 127 S. E. 254.

**Life Estate to Mother With Remainder to Unborn Child.**—An estate to the wife for life under her husband's will with remainder to the testator's right heirs, vests title in the child alive in ventre sa mere at the time of the testator's death, Rules 7 and 12, canons of descent, and upon the subsequent death (intestate) of such child, born alive, the mother inherits the fee from him under Rules 4 and 6; and upon the remarriage of the mother with children resulting therefrom, the children of the second marriage after her death intestate, take the estate as her heirs, and not the collateral relations of the testator. *Semble*, the estate would be cast upon the after-born unprovided-for child, under this section with like result. *Dixon v. Pender*, 188 N. C. 792, 125 S. E. 623.

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## CHAPTER 82

### CRIMES AND PUNISHMENTS

#### Subchapter I. General Provisions

##### ART. 1. FELONIES AND MISDEMEANORS

### § 4171. Felonies and misdemeanors defined.

The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute, has the same legal significance as the words "State's Prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57.

**Concurrence of General and Local Laws.**—Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provide that they shall not have the effect of repealing local or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law, except where otherwise provided by law; and where the local law applicable makes the offense a misdemeanor, punishable by imprisonment, in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder being guilty of a felony, by this section, the two-year statute of limitations is not a bar to the prosecution. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57.

**Conspiring a Misdemeanor.**—Section 4173 changes the offense of a conspiracy committed with deceit and fraud formerly punishable by imprison-

ment in the penitentiary into a misdemeanor, although the punishment is more severe than that prescribed for a misdemeanor at common law. *State v. Lewis*, 185 N. C. 640, 116 S. E. 259.

### § 4172. Punishment of felonies.

The felony defined in § 4209 is not one "for which no specific punishment is prescribed," within this section. The punishment is expressly left to the discretion of the court, which takes the case out of this section. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417.

### § 4173. Punishment of misdemeanors.

See notes of *State v. Hedden* under § 4512 and *State v. Lewis* under § 4173.

### § 4174. Violation of town ordinance misdemeanor; punishment.

**Failure to Prescribe Penalty.**—The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor, is untenable. *State v. Razook*, 179 N. C. 708, 103 S. E. 67.

## ART. 2. PRINCIPALS AND ACCESSORIES

### § 4175. Accessories before the fact; trial and punishment.

**Prior Conviction of Principals Unnecessary.**—Under the provisions of C. S., secs. 4175-4177, it is not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. *State v. Walton*, 186 N. C. 485, 119 S. E. 886.

Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact, when the evidence of their guilt of the offense charged is sufficient both as to them as accessories and the principals directly charged with the murder. *State v. Walton*, 186 N. C. 485, 119 S. E. 886.

## Subchapter IV. Offenses against the Person

### ART. 7. HOMICIDE

### § 4200. Murder in the first and the second degree defined; punishment.

**Evidence Admissible.**—Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery, is expressly made competent by this section, and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree. *State v. Westmoreland*, 181 N. C. 590, 107 S. E. 438.

Testimony of facts and circumstances which occurred after the commission of a homicide which tends to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he had thereafter stated he had done as he had intended, is competent upon the question of deliberation and premeditation, under the evidence in this case, to sustain a verdict of murder in the first degree. *State v. Westmoreland*, 181 N. C. 590, 107 S. E. 438.



**Charges as to Degrees of Homicide.**—Where, upon the trial of one charged with homicide, there is evidence tending to show murder in the first degree, murder in the second degree, manslaughter, and self-defense, it is the duty of the presiding judge, in his charge to the jury, to declare and explain the various phases of the evidence relating to self-defense, and to the various degrees of felonious homicide, and his failure to instruct upon all the essential questions of law properly raised by the evidence constitutes as to each reversible error, which is presented by exception on appeal without specifically raising the question of error complained of by prayers for instruction tendered and refused. *State v. Thomas*, 184 N. C. 757, 114 S. E. 834.

A charge which fails to instruct the jury as to the law upon every essential phase of the evidence relating to the degree of felonious homicide is reversible error, and an exception for failure to charge the jury concerning the various degrees when the evidence presents them takes the question to the Supreme Court on appeal without the necessity of its presentation by defendant's request for special instruction. The necessary elements of the criminal offense of manslaughter arising under the evidence in relation to the charge given in this case discussed in *State v. Thomas*, 184 N. C. 757, 114 S. E. 834.

Where, upon a trial for a homicide, the prisoner has admitted the killing with a pistol, and relies upon the plea of self-defense, and the evidence presents for the consideration of the jury murder in the first degree, murder in the second degree, and manslaughter, and the prisoner has been convicted of murder in the second degree, it is reversible error for the trial judge to charge the jury as to the law relating to murder in the first degree under the provisions of this section, and then to instruct them that all other killings would be murder in the second degree, for this would deprive the prisoner of such of the evidence as tended to repel the inference of malice from the killing with a deadly weapon, which, if established, would, at least, reduce the grade to the offense of manslaughter. *State v. Thomas*, 184 N. C. 757, 114 S. E. 834.

## § 4201. Punishment for manslaughter.

**Photographs Competent as Evidence.**—Upon trial under an indictment for murder where there is evidence tending to show that the deceased was killed by the criminal negligence of the defendant driving an automobile at great speed while intoxicated along a public highway, it is competent for the witnesses to illustrate their testimony by the use of photographs properly testified to be of the place and at the time of the occurrence, and accurately taken. *State v. Lutterloh*, 188 N. C. 412, 124 S. E. 752.

**Charges.**—While under the provisions of C. S., 4640, the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. *State v. Lutterloh*, 188 N. C. 412, 124 S. E. 752.

## ART. 8. RAPE AND KINDRED OFFENSES

## § 4204. Punishment for rape.

**Necessary Allegations.**—By this section, rape is the ravishing and carnally knowing any female of the age of twelve or older by force and against her will, and for conviction of a burglarious entry into a dwelling, presently occupied by a female as a sleeping apartment, with intent to commit rape upon her person, it is necessary to charge in the indict-

ment, and support it with evidence, that at the time of the entry into the dwelling the prisoner had this specific intent, whether he accomplished his purpose, notwithstanding any resistance on her part, or not. *State v. Allen*, 186 N. C. 302, 119 S. E. 504.

**§ 4209. Obtaining carnal knowledge of virtuous girls between twelve and fourteen years old.**

**Essentials of Crime.**—The essentials of the crime in this case are (1) carnally know or abuse a female child; (2) over twelve and under sixteen years of age; (3) the female child never before having had sexual intercourse with any person. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417.

**Effect of Amendment of 1923.**—When the defendant would not be guilty of the offense prohibited by this section, but has since continued to carnally know a female child thereafter, the plea that his continued acts after the passage of the amendment of 1923 would not make him guilty thereunder cannot be sustained. *State v. Porter*, 188 N. C. 804, 125 S. E. 615.

On defendant's appeal from judgment against him in violation of the provisions of this section, amended in 1923, he must show error upon the face of the record, or his exception to the judgment cannot be sustained. *State v. Porter*, 188 N. C. 804, 125 S. E. 615.

**Plea of Guilty May Not Be Withdrawn.**—Upon the trial under this section of carnally knowing a female child over twelve and under sixteen years of age, the defendant may not enter a plea of guilty and thereafter withdraw the plea and enter a defense as a matter of right, and the sentence will be sustained in the absence of abuse of the court's discretion. *State v. Porter*, 188 N. C. 804, 125 S. E. 615.

**Evidence of Recent Complaint.**—Where the prosecutrix has testified upon the trial for the unlawfully carnally knowing or abusing an innocent female child over twelve and under fourteen years of age, her testimony in answer to the questions of the solicitor, to the effect that she had told her mother on the day of the occurrence, who was the only near relative present, is admissible for the purpose of corroborating her other testimony. *State v. Winder*, 183 N. C. 776, 111 S. E. 530.

**Aiding and Abetting.**—One who accompanies in an automobile another who accomplishes his purpose of having carnal knowledge of a female child over twelve and under eighteen years of age, in violation of this section; and with knowledge of this purpose leaves them together in the automobile at night until the purpose has been accomplished, though the female consents, is guilty as an aider or abetter in the commission of the offense, and punishable as a principal therein. *State v. Hart*, 186 N. C. 582, 120 S. E. 345.

**Punishment.**—The felony defined in this section is not one "for which no specific punishment is prescribed" within § 4172, and the discretion of the court in fixing the punishment is limited only by Const. Art. I, § 14. A sentence of 30 years and hard labor is not a "cruel and unusual punishment" for an offense under this section. *State v. Swindell*, 189 N. C. 151, 126 S. E. 417.

ART. 9. ASSAULTS

**§ 4211. Castration or other maiming without malice aforethought.**

See note to § 4212.

**§ 4212. Malicious maiming.**

**Conviction for Loss of Eye.**—Construing this section in connection with the history of legislation on the subject, it is held that thereunder the loss of an eye is not included in the offense of mayhem, and though



the inflection thereof without malice may neither be sustained as provided by section 4211, nor under the common law, requiring that the offense should have been committed with malice, yet upon proper evidence a conviction may be had of an assault with a deadly weapon and an assault with serious damages, as a less degree of the crime charged under the provisions of section 4211. *State v. Wilson*, 188 N. C. 781, 125 S. E. 612.

### § 4213. Maliciously assaulting in a secret manner.

**What Constitutes Secret Assault.**—While it is not required for the conviction of a secret assault, under the provisions of this section that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant, be not previously made known to him; and where the evidence does not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary is reversible error. *State v. Oxendine*, 187 N. C. 658, 122 S. E. 568.

**An assault by means of poison** comes within the intent of our statutes making an assault with a deadly weapon with intent to kill punishable as a felony. *State v. Alderman*, 182 N. C. 917, 110 S. E. 59.

**Evidence Permissible to Show Malice, etc.**—As bearing on the question of malice and felonious intent, the state was allowed to show that, a week or two before the happening of the offenses charged in the bill of indictment, the defendant had been seen about the home of the prosecuting witness; that he had shot at his house and threatened to shoot him. *State v. Miller* (N. C.), 128 S. E. 1.

### § 4214. Assault with deadly weapon with intent to kill resulting in injury.

**Burden of Proof.**—This section under which the appealing defendant was indicted and convicted provides that any person who assaults another (1) with a deadly weapon, (2) with intent to kill, and (3) inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punishable by imprisonment in the state's prison or be worked on the county roads for a period of not less than four months nor more than ten years. These three essential elements must be proved in order to warrant a conviction under the statute (*State v. Crisp*, 188 N. C. 800, 125 S. E. 543); and the burden is on the state to establish them all beyond a reasonable doubt, where the defendant enters a plea of "not guilty" to the charge contained in the bill of indictment. *State v. Redditt*, 189 N. C. 176, 126 S. E. 506, 507.

### § 4215. Punishment for assault.

**Constitutionality.**—This section is not unconstitutional on the grounds that severe sentences for criminal offenses can only be upheld under a statute affirmative in terms, this statute, by correct interpretation affirmatively providing that in all cases of assault with or without the intent to kill, the person convicted shall be punished by fine or imprisonment in the discretion of the court, and not so limiting the court's discretion as to an assault upon a female, etc. *State v. Stokes*, 181 N. C. 539, 106 S. E. 763.

The constitutional inhibition as to the imposition of cruel and unusual punishments may only be invoked in cases of manifest and gross abuse by the trial judge acting within a legislative discretion given him; and, in this case, a sentence of three months on the road, upon conviction for an assault upon a female, cannot be held as a matter of law, on appeal, to be unconstitutional as cruel or unusual. *State v. Stokes*, 181 N. C. 539, 106 S. E. 763.

**Same—Question of Discrimination.**—This section, is not an unwarranted discrimination against one assaulting a female under the terms of the statute, or a denial to him of the equal protection of the laws guaranteed him by the Constitution. *State v. Stokes*, 181 N. C. 359, 106 S. E. 763.

**Evidence Sufficient Under Section.**—Evidence that the prisoner awakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her hand and upon her forehead, is sufficient to convict of an assault upon a female, etc., and a motion as of nonsuit thereon may not be granted, though insufficient for a conviction of the intent to ravish her. *State v. Hill*, 181 N. C. 558, 107 S. E. 140.

Evidence that a negro man twenty-three years of age several times accosted a white girl fifteen years of age, on the streets of a town, with improper solicitation, resulting in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, causing her to become nervous and to lose sleep at night, is held to be such evidence of violence, begun to be executed with ability to effectuate it, as will come within the intent and meaning of this section making it a crime for a man or boy over eighteen years of age to assault any female person. *State v. Williams*, 186 N. C. 627, 120 S. E. 224.

**Same—Recitation by Judge.**—Where there is evidence, upon the trial of an assault by a negro man twenty-three years of age upon a white girl fifteen years of age sufficient for conviction under the provisions of this section, the recitation thereof by the judge in his instructions to the jury is not objectionable as coming under the inhibition of Article XIV, § 1, of the Federal Constitution, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive them of life, liberty, or property without due process of law, or of the equal protection of the laws. *State v. Williams*, 186 N. C. 627, 120 S. E. 224.

## ART. 11. KIDNAPPING AND ABDUCTION

### § 4225. Abduction of married women.

**Effect of Prior Adultery.**—In order to constitute the offense of abducting or eloping with a married woman, under this section, the seduction by the male may be accomplished by insistent persuasion under which the woman yields her consent to be carried away from the house of her husband by the defendant charged therewith and living with him in adultery; and the defense that the woman in the course of his scheme had yielded herself before the abduction is untenable when it is shown that the wife had not thus yielded herself to any other man than the defendant. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769.

**Voluntary Leaving of Husband.**—The fact that the wife had voluntarily left her husband falls within the definition of this section when this results from the unlawful scheming of the man to achieve that end. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769.

**Testimony of Wife Supported by Others.**—The provision of this section that no conviction of abduction or eloping with the wife of another may be had on the unsupported testimony of the wife as to her virtue, is complied with when the testimony of the wife is supported by evidence of others as to her previous good character. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769.

**Evidence of Influence of Defendant.**—Upon the question of the influence of the defendant over the wife of another with whom he is being tried for abducting and eloping, it is competent to show the strength of the influence he had acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that she had used her own money for expenses, is not subject to just exception. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769.

**Testimony of Husband As to Chastity.**—On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home. *State v. Hopper*, 186 N. C. 405, 119 S. E. 769.



## ART. 12. ABORTION AND KINDRED OFFENSES

**§ 4226. Using drugs or instruments to destroy unborn child.**

**Statement of Woman as to Payment of Doctor's Fee.**—The testimony as to the statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of this section and section 4227, that the defendant had paid the physician one-half of the \$200 fee he had charged for such services, and uttered in the defendant's presence, is held competent with the other evidence in this case; and whether the defendant, under the circumstances, was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence; whether they were understood by him, or he denied them or remained silent. *State v. Martin*, 182 N. C. 846, 109 S. E. 74.

**Sufficiency of Evidence.**—Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine, or substance with intent to destroy the child is sufficient for a conviction under this section, the advice and intent for the stated purpose being indictable under our statute. *State v. Powell*, 181 N. C. 515, 106 S. E. 133.

Upon the trial in this action, wherein the defendant was indicted for procuring the miscarriage or abortion of a pregnant woman, under the provisions of this section and section 4227, testimony of the relation between the defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is held sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. *State v. Martin*, 182 N. C. 846, 109 S. E. 74.

Where the defendant is tried under this section and section 4227, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. *State v. Martin*, 182 N. C. 846, 109 S. E. 74.

**§ 4228. Concealing birth of child.**

**Evidence Insufficient and for Directed Verdict.**—Under the provisions of this section making it a felony for any person to conceal the birth of a new-born child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt. *State v. Arrowood*, 187 N. C. 715, 122 S. E. 759.

**Subchapter V. Offenses against the Habitation and Other Buildings**

## ART. 14. BURGLARY AND OTHER HOUSEBREAKINGS

**§ 4232. First and second degree burglary.**

**In General.**—The common-law definition of burglary is a capital offense, i. e., the breaking into and entering of the "mansion or dwelling-house or another in the night-time, with an intent to commit a felony therein, whether the intent was executed after the burglarious act or not. This has been changed by this section dividing the crime into two degrees, first and

second, with certain designated differences between them, with different punishment prescribed for each. *State v. Allen*, 186 N. C. 302, 119 S. E. 504.

**Sufficiency of Charge.**—Where a burglarious breaking into a dwelling-house has been charged in the bill of indictment, and the evidence tends only to establish the capital felony, an instruction to the jury that they might return a verdict of guilty in either degree is erroneous. *State v. Allen*, 186 N. C. 302, 119 S. E. 504.

Where there is evidence of a burglarious entry into a dwelling-house sufficient to convict of the capital offense, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of the greater offense. *State v. Allen*, 186 N. C. 302, 119 S. E. 504.

**Indictment Must Charge Intended Felony.**—In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though the actual commission of the intended felony is not necessary to be charged or proven, or that it was committed at all. *State v. Allen*, 186 N. C. 302, 119 S. E. 504.

## § 4235. Breaking into or entering houses otherwise than burglariously.

**Burglarious Intent Necessary.**—Under the provisions of this section the burglarious, etc., intent of breaking into a storehouse, dwelling, etc., is necessary to a conviction. *State v. Crisp*, 188 N. C. 799, 125 S. E. 543.

**Application of Words "with Intent to Commit a Felony or Other Infamous Crime Therein."**—In *State v. Crisp*, 188 N. C. 799, 801, 125 S. E. 543, it is said: "The trial court was doubtless misled by the dictum in *State v. Hooker*, 145 N. C. 581, 582, 59 S. E. 866, to the effect that, as used in section 3333 of the Revisal, the words 'with intent to commit a felony or other infamous crime therein,' applied only to the clause with which it was closely connected, and not to all the clauses in the section; but this was expressly disapproved in *State v. Spear*, 164 N. C. 452, 79 S. E. 869. And, further, it should be noted that this section of the Revisal has been restated in accordance with the decision in the *Spear* case, brought forward as this section in the Consolidated Statutes."

**Evidence Sufficient for Jury.**—There being direct evidence upon this trial for murder that at night the deceased heard his garage on his premises, wherein was his automobile, being broken into, and upon going there saw several men, whom in the dark he did not recognize; and sufficient circumstantial evidence that the prisoner was one of these, whom he endeavored to arrest with his gun, and who fired upon him, inflicting the mortal wound, it is held sufficient to submit to the jury on the question whether the deceased had reasonable ground to believe the prisoner had committed a felony in his presence, under the provisions of this section, and a verdict of murder in the second degree is sustained in this case. *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644.

**Evidence Sufficient for Conviction.**—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of this section and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. *State v. Williams*, 187 N. C. 492, 122 S. E. 13.



**Subchapter VI. Offenses against Property****ART. 16. LARCENY****§ 4249. Distinction between grand and petit larceny abolished.**

**Where Finder of Property Guilty.**—Where the finder of the property of another of the value of more than \$20 takes the same with the intent of misappropriating it to his own use, and deprive the owner thereof, it is a felony under the provisions of our statute, this section. *State v. Holder*, 188 N. C. 561, 125 S. E. 113.

**ART. 18. EMBEZZLEMENT****§ 4268. Embezzlement of property received by virtue of office or employment.**

**Compared with Section 4401.**—The use of the word “abstract” in section 4401 differentiates it from this section. The latter applies to embezzlement and excepts offenders under sixteen years of age. It is not necessary under section 4401 to allege that the defendant is more than sixteen years old. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

**Accusation of Embezzlement Actionable Per Se.**—The offense defined in this section is a felony, and a false accusation thereof is slander, actionable per se, and malice is presumed. *Elmore v. Atlantic Coast Line R. Co.*, 189 N. C. 658, 127 S. E. 710.

**ART. 19. FALSE PRETENSES AND CHEATS****§ 4277. Obtaining property by false tokens and other false pretenses.**

**Elements of the Crime.**—To constitute the crime of false pretense, a mistake, a pretense, a false pretense, a mere promise or opinion is not sufficient. It must be a (1) false representation of a subsisting fact, whether in writing or in words or in acts; (2) which is calculated to deceive and intended to deceive, and (3) which does in fact deceive (4) by which one man obtains value from another without compensation. *State v. Roberts*, 189 N. C. 93, 126 S. E. 161, 162.

**What Representations Included.**—A representation that a deed of trust covered certain land, which was not in fact included, on the faith of which defendant obtained money is a false pretense within this section. *State v. Roberts*, 189 N. C. 93, 126 S. E. 161.

**§ 4283 (a). Giving bad check; credits; post dated checks.**

Any person, firm or corporation who shall draw and deliver to another any check or draft signed or purporting to be signed by such person, firm or corporation, and draw on any bank or depository for the payment of money or its equivalent and who shall at the time of delivering any such check or draft, as aforesaid, have insufficient funds on deposit in or credits with such bank or depository with which to pay such check or draft upon its presentation and who shall fail to provide such funds or credits for the payment of such check or draft upon its presentation, or within ten days after written or verbal notice of nonpayment, shall be guilty of a misdemeanor

and shall be fined or imprisoned in the discretion of the court. The word "credits" as used herein shall be construed to be an arrangement or undertaking with the bank or depository upon which such check or draft is drawn for the payment of such check or draft upon its presentation. Prosecution under this section shall bar prosecution under section four thousand two hundred and eighty-three, Consolidated Statutes. This section shall not apply to post dated checks or to drafts payable at a fixed or determinable time after the delivery thereof. (1925, ch. 14.)

**§ 4284. Obtaining entertainment at hotels and boarding houses without paying therefor.**

**Constitutionality.** — The misdemeanor prescribed by this section, for one who obtains lodging, food, or accommodations from an inn, boarding or lodging place, expressly applies, when the contract therefor has been made with a fraudulent intent, and this intent also exists in his surreptitiously absconding and removing his baggage without having paid his bill, and this statute is not inhibited by Article I, section 16, of the State Constitution, as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. *State v. Barbee*, 187 N. C. 703, 122 S. E. 753.

**Evidence Insufficient for Conviction.** — In order to convict under the provisions of this section, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boarding house, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boarding house to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. *State v. Barbee*, 187 N. C. 703, 122 S. E. 753.

**Subchapter VII. Criminal Trespass**

**ART. 22. TRESPASSES TO LAND AND FIXTURES**

**§ 4301 (a). Injury to trees, woods, crops, etc., near highway; depositing trash near highway.**

Any person, not being on his own lands, or without the consent of the owner thereof, who shall, within one hundred yards of any State highways of North Carolina or within a like distance of any other public road or highway, willfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower within such limits, or shall deposit any trash, debris, garbage, or litter within such limits, shall be guilty of a misdemeanor, and upon conviction fined not exceeding fifty dollars (\$50) or imprisoned not exceeding thirty days: *Provided*,



*however*, that this act shall not apply to the officers, agents, and employees of the State Highway Commission or county road authorities while in the discharge of their duties. (1924, ch. 54.)

**§ 4309. Setting fire to grass and brush lands and woodlands.**

If any person shall intentionally set fire to any grass land, brush land or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor and shall be fined not less [than fifty dollars nor more than five hundred dollars, or imprisoned for a period of not less than sixty days nor more than four months for the first offence, and for a second or any subsequent similar offense shall be imprisoned not less than four months nor more than one year]. This section shall not prevent an action for the damages sustained by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cut-over land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the state evidence sufficient for the conviction of a violation of this statute shall receive the sum of [fifty] dollars, to be taxed as part of the court costs. (Rev., s. 3346; Code, ss. 52, 53; R. C., c. 16, ss. 1, 2; 1777, c. 123, ss. 1, 2; 1915, c. 243, ss. 8, 11; 1919, c. 318; 1925, c. 61, s. 1.)

**§ 4310. Local: Willfully or negligently setting fire to woods and fields.**

If any person shall willfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields whatsoever, every such offender, upon conviction, shall be fined in the discretion of the court, one-half of the fine to go to the informer, if there be one, and the residue to the school fund of the county wherein such offense was committed, or he shall be imprisoned, in the discretion of the court. This section shall apply only to Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee [Transylvania, Swain, Graham] and Mitchell counties. (1907, c. 320, ss. 4, 5; 1925, c. 61, s. 2.)

**§ 4317 (a). Unlawful posting of advertisements.**

Any person who in any manner paints, prints, places, or affixes, or causes to be painted, printed, placed, or affixed, any business or commercial advertisement on or to any stone, tree, fence, stump, pole, automobile building, or other object, which is the property of another without first obtaining the written consent of such owner thereof, or who in any manner paints, prints, places, puts, or affixes, or causes to be painted, printed, placed, or affixed, such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, mile-

stone, danger-sign, danger-signal, guide-sign, guide-post, automobile building or other object within the limits of a public highway, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars (\$50) or imprisoned not exceeding thirty (30) days. (1924, ch. 109.)

### § 4330. Interfering with telephone lines.

**Civil Action for Damages.**—The willful cutting of a telephone wire in public use for hire is made a misdemeanor punishable by fine or imprisonment by this section, and where such act has caused damage to another the action sounds in tort, making the tortfeasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties. *Hodges v. Virginia-Carolina R. Co.*, 179 N. C. 566, 103 S. E. 145.

## ART. 23. TRESPASSES TO PERSONAL PROPERTY

### § 4331. Malicious injury to personal property.

See notes to § 3789 and Art. I, § 14.

**Putting Nails in Highway Wanton Act.**—An instruction that putting nails in a highway for the purpose of injuring an automobile would be wanton is not erroneous. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248.

## Subchapter VIII. Offenses against Public Morality and Decency

## ART. 24. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY

### § 4339. Seduction.

**Three Elements of Offense.**—To convict the defendant of seduction, it was incumbent upon the state to satisfy the jury upon a reasonable doubt of every element essential to the offense. The three elements are: (1) The innocence and virtue of the prosecutrix; (2) the promise of marriage; and (3) the carnal intercourse induced by such promise. *State v. Crook*, 189 N. C. 545, 127 S. E. 579.

**Meaning of "Innocent and Virtuous."**—In order to convict of crime of seduction under a breach of promise of marriage, the woman should have previously been both innocent and virtuous and should she have committed the act of adultery induced by her own lascivious desire, with or without the promise, her conduct is not such as to bring her within the intent and meaning of this section as an innocent and virtuous woman. *State v. Johnson*, 182 N. C. 883, 109 S. E. 786.

**Same—Intercourse with Husband before Marriage.** — Upon the trial for seduction under a breach of promise of marriage, there was evidence that the woman, a widow, had had sexual intercourse with her husband before her marriage, which had also been induced under promise thereof. However often she may have committed the act with her husband before the marriage, yet had she remained faithful to him thereafter, and had not had sexual intercourse with any other man until that with the defendant, it would render the defendant guilty under the provisions of this section if he had violated them. *State v. Johnson*, 182 N. C. 883, 109 S. E. 786.

**Testimony of Woman Must Be Corroborated As to Each Element.**—The statute provides that the unsupported testimony of the woman shall not be sufficient to convict. This proviso has been construed to mean that the prosecutrix must be supported by independent facts and circumstances as to each element of the offense. *State v. Crook*, 189 N. C. 545, 127 S. E. 579.



**Evidence in Civil and Criminal Action.**—In the plaintiff's civil action to recover damages in tort for her seduction, the weight and credibility of her evidence are for the jury to determine; and an instruction in such action, as distinguished from a criminal indictment under the provisions of this section, that her unsupported evidence is insufficient to warrant a verdict in her favor, is reversible error. *Hardin v. Davis*, 183 N. C. 46, 110 S. E. 602.

It is only necessary for plaintiff's recovering damages in her civil action, in tort, for wrongful seduction, to show that the defendant induced the intercourse by persuasion, deception, enticement, or other artifice; not requiring, as in prosecution under this section, that the intercourse was procured under a promise of marriage, though when existent this may be shown in the civil action as a means used by the defendant to accomplish his purpose. *Hardin v. Davis*, 183 N. C. 46, 110 S. E. 602.

**Sufficiency of Evidence.**—Where there is evidence upon the trial for seduction under breach of promise of marriage that the woman had consented to the act, induced solely by her own lascivious desire, irrespective of the promise to which she had testified, the jury may disregard her testimony as to the promise, and render a verdict acquitting the defendant of the charge; and a requested instruction is erroneously refused which leaves out the element of seduction and bases the defendant's innocence or guilt on the finding as to whether the woman had been solely induced by her own desire. *State v. Johnson*, 182 N. C. 883, 109 S. E. 786.

The weight and credibility of the evidence supporting that of the woman, upon the trial of seduction, under this section, is for the jury, if it comes within the requirement of being legal evidence, however slight it may be. *State v. Doss*, 188 N. C. 214, 124 S. E. 156.

**Erroneous Instruction Eliminating Supporting Evidence.** — Where there is supporting testimony of the woman in her statutory action for seduction, to wit, the carnal intercourse with an innocent and virtuous woman, induced by promise of marriage, an instruction which eliminates the necessary supporting evidence of the woman to only the element of the promise of marriage is reversible error. *State v. Doss*, 188 N. C. 214, 124 S. E. 156.

## § 4343. Fornication and adultery.

**When Declarations of Woman Competent against Man.**—Upon the demurrer by the male defendant to the State's evidence, upon a trial for fornication and adultery, the principle that the declarations of one defendant may not be received in evidence of the guilt of the other does not apply when the declarations of the paramour of the male defendant is made in his presence, while the female defendant is assaulting his wife and he is standing inactively by and encouraging her therein by his conduct, and remains silent when the paramour's declarations are so made. *State v. Roberts*, 188 N. C. 460, 124 S. E. 833.

Where the defendants are being tried for fornication and adultery, testimony of the wife that the feme defendant accompanied by her husband had entered the store where she was at work, and had left together after the feme defendant, uninterrupted by her husband, had assaulted her and told her of matters inferring the guilt of her husband, etc., while the declarations are primarily the declarations of the feme defendant, they are also competent against the male defendant who stood silent at the time and by his conduct acquiesced therein. *State v. Roberts*, 188 N. C. 460, 124 S. E. 833.

## § 4349 (b). Circulating publications barred from the mails.

It shall be unlawful for any news agent, news dealer, book-seller, or any other person, firm, or corporation to offer for sale, sell, or

cause to be circulated within the State of North Carolina any magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

It shall be unlawful for any person, firm, or corporation to offer for sale, sell, or give to any person under the age of twenty-one years any such magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

This section shall not be construed to in any way conflict with or abridge the freedom of the press, and shall in no way affect any publication which is permitted to be sent through the United States mails.

Any person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor. (1924, ch. 45.)

## ART. 25. PROSTITUTION

### § 4357. Definition of terms.

**Sufficiency of Evidence.**—On this appeal from conviction for the defendant's having engaged in immoral prostitution and unlawfully using a building for like purpose in violation of this section et seq., the judgment is reversed for the lack of evidence to justify the verdict, and the defendant's motion for judgment as of nonsuit under section 4643, should have been granted. *State v. Bradshaw*, 182 N. C. 769, 108 S. E. 722.

For a case where the evidence was held sufficient to sustain a conviction under this section, see *State v. Sinodis*, 189 N. C. 565, 127 S. E. 601.

### § 4362. Punishment; probation; parole.

**Sentence for Vagrancy under This Section.** — Where a conviction for vagrancy has been legally had under section 4459, and the sentence has been imposed of imprisonment for twelve months allowed under this section, the case will be remanded for the imposition of the proper sentence. *State v. Walker*, 197 N. C. 730, 102 S. E. 404.

The punishment under this section, exceeds an imprisonment of thirty days or a fine of fifty dollars, and where a prosecution is heard in the Superior Court on a warrant issued by the mayor of a town, and not on appeal from the recorder's court, nor upon indictment found by a grand jury, and an amendment has been allowed in the language of section 4459 defining vagrancy, and limiting the punishment to a fine of fifty dollars or imprisonment for thirty days, a sentence upon conviction, for twelve months cannot be sustained. *State v. Walker*, 179 N. C. 730, 102 S. E. 404.

## Subchapter IX. Offenses against Public Justice

### ART. 29. MISCONDUCT IN PUBLIC OFFICE

### § 4385. Failing to make reports and discharge other duties.

**Editor's Note.** — As to civil action to enforce turning over of public funds, see note under § 867.

### § 4399 (a). Private use of publicly owned vehicle.

It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or



agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. (1925, c. 239, § 1.)

**§ 4399 (b). Obtaining repairs and supplies for private vehicle at expense of State.**

It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or to use any tires, oils, gasoline or other accessories purchased by the State, or any county, or any institution or agency of the State, in or on any such private car. (1925, c. 239, s. 2.)

**§ 4399 (c). Limitation of amount expended for vehicle.**

It shall be unlawful for any officer, agent, employee or department of the State of North Carolina, or of any county, or of any institution or agency of the State, to expend from the public treasury an amount in excess of fifteen hundred dollars (\$1,500) for any motor vehicle other than motor trucks; except upon the approval of the Governor and Council of State: *Provided*, that this act shall not apply to any automobile purchased for the use of the Governor: *Provided, further, however*, that nothing in this act shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so. (1925, c. 239, s. 3.)

**§ 4399 (d). Publicly owned vehicle to be marked.**

It shall be the duty of the executive head of every department of the State Government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height, that such car belongs to the State, or to some county, or institution or agency of the State, and that such car is "for official use only." (1925, c. 239, s. 4.)

**§ 4399 (e). Penalties.**

Any person, firm or corporation violating any of the provisions of sections 4399(a) to 4399(d) shall be guilty of a misdemeanor, and punished by a fine of not less than one hundred dollars (\$100), nor more than one thousand dollars (\$1,000), or imprisonment in the discretion of the court. Nothing in this act shall apply to the purchase, use or up-keep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5.)

## ART. 30. MISCONDUCT IN PRIVATE OFFICE

**§ 4401. Malfeasance of bank officers and agents.**

**Compared with Section 4268.**—The use of the word “abstract” in this section marks a difference between this statute and section 4268, the latter applying to embezzlement; and under the former statute it is not necessary for the indictment or evidence to comply with the terms of section 4268, excepting offenders under the age of sixteen years. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

**The Word “Abstract.”**—The legal meaning of the word “abstract,” as it appears in this section, with reference to the unlawful use of the funds of the bank, is correctly charged under an instruction to the jury defining it as the taking from or withdrawing from the bank, with the intent to injure or defraud. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

**No Conflict with Section 224(e).**—This section, making it a criminal offense for the cashier or certain other officers, agents and employees of a bank to be guilty of malfeasance in the respects therein enumerated, making the intent necessary for a conviction, is not in conflict with section 224(e). *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

**Depositor in Collusion Convicted as Principal.**—Where a depositor, in collusion with the cashier of a bank, has “abstracted” or caused to be abstracted by the cashier moneys of the bank in violation of the provisions of this section, though the depositor was not present at the time the offense was committed, he may be convicted as a principal under the counts of the indictment so charging the offense. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

In order to convict a depositor at a bank who has abstracted funds from the bank in collusion with its cashier, it is not required that he himself was an officer of the bank or that he was present at the time the money was feloniously “abstracted,” under the provisions of this section; and he may be convicted thereunder when the bill of indictment substantially follows the language of the statute and the evidence is sufficient to sustain the charge therein. This is not applicable to the provisions of section 224(e). *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

**Sufficiency of Indictment.**—An indictment for unlawfully abstracting the funds of a bank, to the injury of persons, corporations, etc., is sufficient if it substantially follows the express wording of this section in a plain, intelligent and sufficient manner, though without strict regard to form, technicality or refinement. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

In order to convict of malfeasance of bank officers and agents under the provisions of this section, it is sufficient to allege in the indictment the “intent to defraud, without naming therein the particular person or body corporate intended to be defrauded,” etc.; and an indictment under this section, charging the act “with intent to injure,” is held sufficient. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

**§ 4402. Making false entries in banking accounts, misrepresenting assets and liabilities of banks.**

**Sufficiency of Indictment.**—Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the State of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of this section under which the indictment had been drawn. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47.



**Subchapter X. Offenses against the Public Peace****ART. 32. OFFENSES AGAINST THE PUBLIC PEACE****§ 4410. Carrying concealed weapons.**

If any one, except when on his own premises, shall carry concealed about his person any bowie-knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court. If any one, except on his own premises, shall carry concealed about his person any pistol or gun, he shall be guilty of a misdemeanor and shall be fined not less than fifty dollars, except in Durham, Halifax, and Northampton counties, where the minimum fine shall be one hundred dollars, nor more than two hundred dollars, or imprisoned not less than thirty days nor more than two years, at the discretion of the court, [for the first offense, and for the second and subsequent offenses he shall be fined not less than two hundred dollars or more than five hundred dollars, or imprisoned for not less than four months or more than two years, at the discretion of the court, but that in the case of a first or subsequent offense the court shall have no power to suspend judgment upon the payment of costs. It shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge is the first, second or subsequent offense, and if it shall be the second or subsequent offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence of said second or subsequent offense before the trial court.] *Provided*, that the portion of this section in brackets shall apply only to the counties of [Franklin] Halifax and Northampton. Upon conviction or submission the deadly weapon with reference to which the defendant shall have been convicted shall be condemned and ordered confiscated and destroyed by the judge presiding at the trial. If any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be prima facie evidence of the concealment thereof. This section shall not apply to the following persons: officers and soldiers of the United States army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties. (Rev., s. 3708; Code, s. 1005; 1917, c. 76; 1919, c. 197, s. 8; 1923, cc. 48, 57; 1924, c. 30.)

**Time is not the essence** of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. *State v. Spencer*, 185 N. C. 765, 117 S. E. 803.

**Evidence Sufficient for Jury.**—Upon evidence tending to show that an officer arrested the defendant when the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, with the apparent intent of interfering with the

safe-keeping of a prisoner the officer was guarding, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of this section. *State v. Mangum*, 187 N. C. 477, 121 S. E. 765.

### § 4414 (a). Disturbing students at schools for women.

It shall be unlawful for any male person to willfully disturb, annoy or harass the students of any boarding school or college for women situated anywhere in North Carolina by rude conduct or by persisting unnecessary presence on or near the property of the school or college; or by the willful addressing or communicating orally or otherwise with said students while on school property, or while elsewhere when in charge of a teacher, officer or student of said school. The violation of this section shall be deemed a misdemeanor punishable by a fine of not less than five dollars (\$5) nor more than fifty dollars (\$50), or by imprisonment not to exceed thirty days. (1925, c. 189, s. 1.)

## Subchapter XII. General Police Regulations

### ART. 34. LOTTERIES AND GAMING

#### § 4433. Keeping gaming tables or betting thereat.

**Evidence Admissible.**—Where the defendants admit keeping gaming tables for which they were indicted under the provisions of this section, they may not sustain their exception to the admission of evidence tending to show they were continuously present at the place, and as a foundation for further evidence tending to show their large share in the receipts of these tables, and other relevant circumstances, on the ground that it prejudiced them with the jury and was immaterial to the issue. *State v. Galloway*, 188 N. C. 416, 124 S. E. 745.

### ART. 36. PROTECTION OF THE FAMILY

#### § 4447. Abandonment of family by husband.

If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor: [*Provided*, that the abandonment of children by the father shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen years.] (Rev., s. 3355; Code, s. 970; 1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; 1925, c. 290.)

**Strictly Construed.**—This section should be strictly construed, and its terms may not be extended to include, by implication, cases not clearly within its meaning. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

**Applies before Children Born.**—The provisions of this section, as to abandonment, apply to the abandonment of the husband of his wife before children born of the marriage, making it an indictable offense. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

**Divorce after First Conviction No Defense on New Trial.**—Where the husband has been indicted, tried, and convicted for the criminal abandonment of his wife, under this section, and upon appeal he has been



granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

**Abandonment of Children after Divorce.**—Within the intent and meaning of this section, the willful abandonment by the father of his children of the marriage is made a separate offense of like degree with that of his willful abandonment of his wife; and his duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

Punctuation may now be considered as an aid in construing the purpose or intent of the Legislature in enacting a statute especially when brought forward from time to time by legislative reenactment; and it is held that the placing of a comma after the words "such wife," in this section, with regard to the husband's abandonment, evinces the legislative intent to create two offenses, the one, the willful abandonment of the wife, and the other, the willful abandonment by the father of his children of the marriage; especially when construed in connection with C. S., 4450, making it a misdemeanor for the husband to "willfully neglect to provide adequate support for his wife and the child or children which he has begotten by her." *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

**Both Abandonment and Non-Support Must Be Proved.**—Upon a trial under an indictment of the husband for the abandonment of his wife, both the fact of willful abandonment and that of failure to support must be alleged and proved, the abandonment, being a single act and not a continuing offense, day by day, but the duty to support being a continuing one during the marital union, to be performed by him unless relieved therefrom by legal excuse; and his willful abandonment and failure to provide constitutes the statutory offense. *State v. Beam*, 181 N. C. 597, 107 S. E. 429.

**Abandonment Must Be Willful.**—The willful abandonment of the wife is an essential element of the offense made criminal by this section, and the prosecutrix is required to show beyond a reasonable doubt, upon the issue of defendant's guilt, that he had willfully abandoned her without providing adequate support, from which the jury may infer, if so satisfied, that it had been done intentionally, without just cause or legal excuse. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

Section 4448, by specifying certain circumstances under which the failure of the husband to provide an adequate support for his wife and children, shall be presumptive evidence that such abandonment and neglect was willful, construed with this section, making his willful abandonment a misdemeanor, evidences that the legislative intent was well considered, and that not the mere abandonment, but the willful abandonment was the criminal act contemplated. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

**Finding of Willful Abandonment Includes Lack of Justification.**—A conviction of a willful abandonment by the husband of his wife is equivalent to a finding that he has left her without justification. *State v. Beam*, 181 N. C. 597, 107 S. E. 429.

**Wife Not Deprived of Civil Remedies.**—Requiring the state to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, under this section, does not deprive the wife of her civil remedies under the provisions of section 1667. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

**Punishment for Violation.**—Our Constitution, Art. II, sec. 4, making a person guilty of a misdemeanor punishable by commitment to houses of correction leaving this matter of establishing a house of correction discretionary with the legislative power, and a sentence may be imposed of imprisonment upon a husband convicted of abandonment under this section, and other offenses of like kind, or to assign them to work on the roads during their term. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

**Significance of Caption.**—While the caption may not be considered in the interpretation of a statute when in conflict with the terms expressed in the body of the act, it will be given greater significance in its interpretation when the original act has been amended and the caption accordingly changed, and thus recognized by the Legislature in bringing the act with its amendment forward in the codified law; and this rule applies to the interpretation of this section, as to the offense of the willful abandonment by the husband of his wife or children, fortified by C. S., 4449, authorizing the trial judge to provide for the support of the deserted wife, or children, or both. *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

**Venue.**—When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails of performance, the venue of an action under the provisions of this section, is in that county. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449.

**Same—Plea in Abatement after Plea of Not Guilty.**—Where the defendant has been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of this section; on appeal held, his plea in abatement comes too late after his plea of not guilty. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449.

**Same—Presumption.**—The law presumes that the offense of abandonment by the husband of his wife and child, under this section, took place at the place alleged in the indictment, and the burden is on the defendant to show otherwise. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449.

**Same—Where Husband Non-Resident.**—Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another State, he cannot direct her choice of residence and is indictable under this section in the county of her residence. *State v. Beam*, 181 N. C. 597, 107 S. E. 429.

**Burden of Proof.**—In order for the jury to acquit a defendant tried for the willful abandonment of his wife it is not required that he introduce evidence in his defense, nor is his failure to have done so to be taken against him, and the burden of the issue remains on the State throughout the trial. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

**Same—Unchastity of Wife.**—Upon the trial of the husband for abandonment, under this section, the wife's unchastity is a defense, which he may put in issue by cross-examination or otherwise, with the burden remaining on the State to show his guilt beyond a reasonable doubt. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

Upon the trial of the husband for the willful abandonment of his wife, under this section, the burden of producing evidence of the wife's unchastity is not upon the husband, or within the rule applicable when the facts and circumstances are peculiarly within the knowledge of the party relying upon them. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

Where there is evidence that the husband indicted for the willful abandonment of his wife, etc., under this section, was occasioned by her unchastity, it raises the question of his criminal intent therein, and it is reversible error for the court to charge the jury that the burden was on the defendant to satisfy them by the greater weight of the evidence of the fact of her unchastity, though he has charged them that the burden was on the State to show guilt beyond a reasonable doubt. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

**Statute of Limitation.**—Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh "abandonment and failure to support," made a misdemeanor by this section, and an indictment found within two years therefrom is not barred by the statute of limitations. *State v. Beam*, 181 N. C. 597, 107 S. E. 429.

The promise of the father to support his children and his making gifts to them is sufficient to repel the bar of the two-year statute of limitations, whether he was living in the same home with them or otherwise, in pro-



ceedings under this section for his willfully abandoning them. *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

Where the abandonment by the husband of the wife consisted in his failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date, and was not a bar under the facts of this case. *State v. Hooker*, 186 N. C. 761, 120 S. E. 449.

### § 4448. Evidence that abandonment was willful.

See notes to preceding section.

**When Evidence for Defendant Necessary.**—Where the nonsupport and abandonment of the husband are both established or admitted, under this section, it may be necessary for the defendant to come forward with his evidence and proof to avoid the risk of an adverse verdict. *State v. Falkner*, 182 N. C. 793, 108 S. E. 756.

### § 4449. Order of support from husband's property or earnings.

See notes to § 4447.

**In Addition to Section 4447.**—This section, conferring upon the judge having jurisdiction of the offense of the husband abandoning his wife, etc., the power to provide for the support of the abandoned wife and children is in addition to the powers conferred by section 4447, and does not otherwise modify or interfere with its force and effect in making the abandonment of the wife a misdemeanor. *State v. Faulkner*, 185 N. C. 635, 116 S. E. 168.

**"Husband," Applies after Divorce.**—This section, uses the word "husband" as descriptio personae, in his relation to the child of the marriage to whom his duty of support continues after a decree of divorcement has been entered; and does not confine the offense to the abandonment of the wife. *State v. Bell*, 184 N. C. 701, 115 S. E. 190.

### § 4450. Failure of husband to provide adequate support for family.

See note to section 4447.

## ART. 38. PUBLIC DRUNKENNESS

### § 4458. Local: Public drunkenness.

If any person shall be found drunk or intoxicated on the public highway, or at any public place or meeting, in any county, township, city, town, village or other place herein named, he shall be guilty of a misdemeanor, and upon conviction shall be punished as is provided in this section:

1. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in the counties of Ashe, Catawba, Cleveland, Dare, Gaston, Graham, Greene, Haywood, Henderson, Hyde, Jackson, Lincoln, Macon, Madison, Mecklenburg, Moore, Pitt, Richmond, Rutherford, Scotland, Stanly, Swain, Union, Vance, Warren, [Franklin] and Washington, in the townships of Fruitville and Poplar branch in Currituck county, and at Pungo in Beaufort county. (1907, cc. 305, 785, 900; 1908, c. 113; 1909, c.

815; P. L. 1915, c. 790; P. L. 1917, cc. 447, 475; P. L. 1919, cc. 148, 200.)

2. By a fine of not less than three dollars nor more than fifty dollars, or by imprisonment for not more than thirty days, in Yancey county. (1909, c. 256.)

3. By a fine of not less than two dollars and fifty cents nor more than fifty dollars, or by imprisonment for not more than thirty days, in Buncombe county. (1909, c. 271.)

4. By a fine of not less than five dollars nor more than twenty-five dollars, or by imprisonment for not more than ten days, in Cherokee and Yadkin counties. (1907, c. 976.)

5. By a fine of not less than three dollars nor more than five dollars in Clay county, all such fines to go to the public school fund of that county. (1907, c. 309.)

6. By a fine of not less than five dollars nor more than ten dollars in Wake county, all such fines to go to the general road fund of that county. (1907, c. 908.)

7. By a fine of not more than fifty dollars, or by imprisonment for not more than thirty days, in Mitchell county: *Provided*, that this subsection shall not apply to incorporated towns in that county. (1909, c. 111.)

8. By a fine of not less than five dollars nor more than fifty dollars, or by imprisonment for not more than ten days, in the village of Kannapolis, or on the premises or within one mile of the Kannapolis cotton mills. (1909, c. 46, s. 2.)

9. By a fine, for the first offense, of not less than ten nor more than twenty dollars; for second and further offense, not less than twenty nor more than thirty dollars, or imprisoned for not more than twenty days, in Transylvania county. (P. L. 1919, c. 190; Rev., s. 3733; 1897, c. 57; 1899, cc. 87, 208, 608, 638; 1901, c. 445; 1903, cc. 116, 124, 523, 758; 1924, c. 5.)

#### ART. 39. VAGRANTS AND TRAMPS

### § 4459. Persons classed as vagrants.

**Amendment to Warrant.**—Where a warrant in a criminal action charges the defendant with “being a vagrant,” it is within the discretion of the Superior Court judge to allow an amendment specifying the particular act under which it has been issued; and while it is the better practice to reduce the amendment to writing at the time, the order is self executing, and failure to do so does not destroy its legal effect. *State v. Walker*, 179 N. C. 730, 102 S. E. 404.

**Imposition of Wrong Sentence.**—Where a conviction for vagrancy has been legally had under this section, and the sentence has been imposed of imprisonment for twelve months allowed under section 4362, the case will be remanded for the imposition of the proper sentence. *State v. Walker*, 179 N. C. 730, 102 S. E. 404.

The punishment under section 4362, exceeds an imprisonment of thirty days or a fine of fifty dollars, and where a prosecution is heard in the Superior Court on a warrant issued by the mayor of a town, and not on



appeal from the recorder's court, nor upon indictment found by a grand jury, and an amendment has been allowed in the language of this section defining vagrancy, and limiting the punishment to a fine of fifty dollars or imprisonment for thirty days, a sentence upon conviction, for twelve months can not be sustained. *State v. Walker*, 179 N. C. 730, 102 S. E. 404.

#### ART. 42. REGULATION OF LANDLORD AND TENANT

### § 4480. Local: Violation of certain contracts between landlord and tenant.

If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars or imprisoned not exceeding thirty days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars or imprisoned not exceeding thirty days. This section shall apply to the following counties only: Wayne, Lenoir, Greene, Johnston, Jones, Onslow, Craven, Cleveland, Sampson, Pitt, Duplin, Gates, Cumberland, Perquimans, Chowan, Robeson, Bladen, Nash, Harnett, Edgecombe, Hertford, Wilson, Rockingham, Pender, Currituck, Gaston, Northampton, Beaufort, Chatham, Tyrrell, Mecklenburg, Halifax, Caswell, Camden, Cabarrus, Columbus, Martin, Washington, Wake, Alexander, Montgomery, Pamlico, Rowan, Rutherford, Bertie, Warren, Lincoln, [Randolph] and Lee. (Rev., s. 3366; 1905, cc. 297, 383, 445, 820; 1907, c. 84, s. 1; 1907, c. 595, s. 1; 1907, cc. 8, 639, 719, 869; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2.)

**Unconstitutional.**—Under the provisions of our Constitution, Art. I, sec. 16, inhibiting "imprisonment for debt excepting in cases of fraud," this section, making it a misdemeanor for a tenant to willfully abandon his crop without paying for advances made to him by his landlord, and not requiring allegation or evidence of fraud, is unconstitutional, and the further provisions of the statute creating a civil liability for the one hiring such tenant with knowledge of the circumstances, being connected with and dependent upon the former, both in express terms and substance, is likewise unconstitutional. *Minton v. Early*, 183 N. C. 199, 111 S. E. 347.

The liability of one hiring a tenant of another who has willfully abandoned a crop without paying the landlord for advances he has made thereon fixed by the provisions of this section, without allegation or evidence of fraud on the part of such tenant, is in contravention of the liberties and vested rights protected by constitutional guaranties that should always be upheld by the courts. *Minton v. Early*, 183 N. C. 199, 111 S. E. 347.

**§ 4481. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.**

If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement; or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars or imprisoned not more than thirty days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof. This section shall apply only to the follownig counties: Wake, Hyde, Anson, Hertford, Sampson, Franklin, Union, Richmond, Moore, Lincoln, Rowan, Rutherford, Halifax, Rockingham, Lee, Granville [Randolph] and Person. (Rev., s. 3367; 1905, c. 299, ss. 1-7; 1907, c. 84, s. 2; 1907, c. 238, s. 1; 1907, c. 595, s. 2; 1907, cc. 543, 810; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3.)

ART. 47. MISCELLANEOUS POLICE REGULATIONS

**§ 4506. Operating automobile while intoxicated.**

Any person who shall, while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate an automobile upon [any public highway or cartway or other road over which the public has a right to travel] of any county or the streets of any city or town in this state, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisonment not less than thirty days, or both, at the discretion of the court [and the judge may in his discretion deny said person or persons the right to drive an automobile on any of the roads defined in this section for a period of not more than twelve months.] (1919, c. 234; 1925, c. 283.)

**The intent of this section,** is to protect the public from the danger of intoxicated persons, etc., driving automobiles on public highways and streets, and the punishment imposed, being restricted by the statute to a minimum as to fine or imprisonment, is left to the sound discretion of the trial judge. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

**Sentence Not Reviewable on Appeal.**—Where a statute leaves a punishment for its violation within the sound discretion of the trial court, the sentence imposed therein will not be reviewed by the Supreme Court on



appeal where its exercise has not been grossly and palpably abused. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

**Jurisdiction of Municipal Court.**—Where a statute creating a municipal court does not give it criminal jurisdiction over the offense of driving automobiles upon a public highway or street, while intoxicated, etc., this jurisdiction is acquired by Laws 1919, this section, to the extent only of binding the defendant over to the Superior Court upon conviction. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

**Policeman May Arrest without Warrant.**—A policeman of a city is given the same authority as is vested by law in sheriffs, and may arrest, without a warrant, a person in his presence violating the statute forbidding the operation of an automobile upon the streets by a person under the influence of intoxicating liquor. *State v. Loftin*, 186 N. C. 205, 119 S. E. 209.

### § 4511 (d). Dogs on "Capitol Square;" worrying squirrels.

It shall be unlawful for any owner or keeper of a dog to permit the same to run at large on the Capitol grounds known as "Capitol Square" or to be thereon unless on leash or otherwise in the immediate physical control of said owner or keeper, to pursue, worry or harass any squirrel or other wild animal kept on said grounds. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. (1925, c. 289.)

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## CHAPTER 83

### CRIMINAL PROCEDURE

#### ART. 1. GENERAL PROVISIONS

### § 4512. Statute of limitations for misdemeanors.

See note of *State v. Hooker* under § 4447.

**Repeal of Local Statutes.**—Our general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provide that they shall not have the effect of repealing local or special statutes upon the subject, but they shall continue in full force and in concurrence with the general law, except where otherwise provided by law; and where the local law applicable makes the offense a misdemeanor, punishable by imprisonment in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder being guilty of a felony and section 4171, the two-year statute of limitations provided by this section is not a bar to the prosecution. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57.

**Erroneous Instructions Extending Time.**—For the conviction of a misdemeanor prescribed for the abandonment by the husband of his wife and children, it is required by this section, that presentment shall be made or found by the grand jury within two years after the commission of the offense, and a conviction of the husband otherwise cannot be sustained; and an instruction of the trial judge extending the time for a period caused by delays in the investigation in the court of the justice of the peace, should the warrant have been issued in the time prescribed by the statute, is reversible error, such being insufficient to repel the bar of the statute. *State v. Hedden*, 187 N. C. 803, 123 S. E. 65.

**§ 4515. Accused entitled to counsel.**

See note to § 203.

**ART. 2. WARRANTS****§ 4526. Warrant indorsed and served in another county.**

Applied in *Stancill v. Underwood*, 188 N. C. 475, 124 S. E. 845.

**ART. 5. ARREST****§ 4543. Arrest for felony, without warrant.**

A Federal prohibition officer, acting under the National Prohibition Act, can derive no further authority to arrest an offender without a warrant than the Federal statute itself provides; and no further power can be acquired by him by virtue of this section, permitting such to be done by a private person, in case of felony, such as murder, rape, and the like, when the unlawful act has been committed in his presence. *State v. Burnett*, 183 N. C. 703, 110 S. E. 588.

**Sufficiency of Evidence.**—There being direct evidence upon this trial for murder that at night the deceased heard his garage on his premises, wherein was his automobile, being broken into, and upon going there saw several men, whom in the dark he did not recognize; and sufficient circumstantial evidence that the prisoner was one of these, whom he endeavored to arrest with his gun, and who fired upon him, inflicting the mortal wound, it is held sufficient to submit to the jury on the question whether the deceased had reasonable ground to believe the prisoner had committed a felony in his presence, under the provisions of this section, and a verdict of murder in the second degree is sustained in this case. *State v. Blackwelder*, 182 N. C. 899, 109 S. E. 644.

**§ 4544. When officer may arrest without warrant.**

This section applies only to peace officers of the State, and in the enforcement of the State law, and does not affect the conduct or powers of Federal officers unless the principles therein are extended to such officers by a Federal statute, when in the enforcement of a valid Federal law. *State v. Burnett*, 183 N. C. 703, 110 S. E. 588.

A national prohibition officer, in making an arrest, is confined to the authority given him by the Federal statutes, and no additional power to make an arrest without a warrant can be conferred by this section. *State v. Burnett*, 183 N. C. 703, 110 S. E. 588.

**§ 4548. Procedure on arrest without warrant.**

Applied in *State v. Campbell*, 182 N. C. 911, 110 S. E. 86. See notes of this case under § 3385.

**ART. 6. FUGITIVES FROM JUSTICE****§ 4554. Governor may employ agents, and offer rewards.**

The governor, on information made to him of any person, whether the name of such person be known or unknown, having committed a felony or other infamous crime within the state, and of having fled out of the jurisdiction thereof, or who conceals himself within the state to avoid arrest, or who, having been convicted, has escaped and cannot otherwise be apprehended, may either employ a special agent,



with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed. (Rev., s. 3188; Code, s. 1169; 1891, c. 421; R. C., c. 35, s. 4; 1800, c. 561; 1860, c. 28; 1868-9, c. 52; 1870-1, c. 15; 1871-2, c. 29; 1925, c. 275, s. 6.)

**Editor's Note.**—By the act of 1925 a clause, authorizing the governor to issue warrants for money to be used in apprehending fugitives from justice, was stricken from the section.

### **§ 4556. Expenses paid in bringing fugitive from another state.**

Repealed by acts of 1925, c. 275, s. 6.

## **ART. 7. PRELIMINARY EXAMINATION**

### **§ 4560. Testimony reduced to writing; right to counsel.**

**In General.**—Our various statutes relating to the introduction of testimony at the second trial of evidence introduced in the preliminary hearing of a criminal action do not affect the common-law rule, but they are extensions of its principle, making it only necessary when the statutory provisions as to the making of the written record, its correction, signature by the witness, etc., have been complied with, to sufficiently identify the record for its admission as evidence upon the second trial. *State v. Maynard*, 184 N. C. 653, 113 S. E. 682.

### **§ 4563. Answers in writing, read to prisoner, signed by magistrate.**

See note to § 4560.

### **§ 4572. Proceedings certified to court; used as evidence.**

See note to § 4560.

## **ART. 9. FORFEITURE OF BAIL**

### **§ 4588. Judges may remit forfeited recognizances.**

**Petition after Final Judgment.**—A surety on a bail bond may under this section present a petition for relief to the judge of the superior court, notwithstanding that a final judgment has been rendered. *State v. Bradsher*, 189 N. C. 401, 127 S. E. 349.

## **ART. 11. VENUE**

### **§ 4606. Improper venue met by plea in abatement; procedure.**

**Crime Where Alleged.**—Under this section, a criminal offense is deemed to have taken place in the county in which the indictment charges it had occurred, unless the defendant deny the same by the plea in abatement. *State v. Oliver*, 186 N. C. 329, 119 S. E. 370.

**Jurisdiction of Person Acquired by Consent.**—While the court's jurisdiction of the subject-matter of a criminal offense may not be acquired with the defendant's consent, it is otherwise as to the jurisdiction of his

person; and where he asks and obtains a continuance of the action against him, he waives the court's want of jurisdiction of his person, and thereafter a plea in abatement comes too late. *State v. Oliver*, 186 N. C. 329, 119 S. E. 370.

### ART. 13. INDICTMENT

#### § 4610. Waiver of bill of indictment.

**Constitutionality.**—This section, authorizing the waiver of an indictment in the Superior Court by the defendant bound over from an inferior court, is constitutional and valid. *Constitution*, Art. IV, sec. 13. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

**Refinements Abolished.**—The technical and useless refinements of the common law, formerly required in drawing bills of indictment in criminal cases, have been all abolished by statute. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888.

#### § 4613. Bill of particulars.

**Indictment for Perjury.**—Where the defendant in an action for perjury is in ignorance of the particulars of the offense charged, his remedy is by application to the court for a bill of particulars under this section if the indictment is in the form prescribed by C. S., sec. 4615. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888.

**Indictment for Malfeasance of Bank Officer.**—It is within the sound discretion of the trial judge to try, separately or collectively, the defendant, indicted under the provisions of C. S., 4401, for some or all offenses committed by a series of checks on the bank, whereby he had unlawfully "abstracted" the funds of the bank; and where the indictment is sufficient for conviction, the defendant's remedy is by requesting a bill of particulars when he reasonably so desires. *State v. Switzer*, 187 N. C. 88, 121 S. E. 143.

**What Constitutes Waiver of Right.**—Where a bank employee is charged with the indictable offense of making false entries upon the books of the bank in fraud or deceit of "other persons to the jurors unknown," the defendant should make his motion to the discretion of the trial judge for a bill of particulars requiring the name of these unknown persons, and his failure to do so will be deemed a waiver of his right. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47.

#### § 4615. Form of bill for perjury.

See notes to § 4613.

**Sufficiency of Indictment.**—A bill of indictment is sufficient to constitute the charge of perjury if it is in the words prescribed by this section. Though on the trial the State must show beyond a reasonable doubt that the evidence as charged was false, that it was corruptly and wilfully done, and upon a point material to the issue in the case set out in the bill of indictment; an indictment drawn in the form prescribed by the statute is sufficient. *State v. Cline*, 150 N. C. 854, 64 S. E. 591, overruled. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888.

**Surplusage.**—Where perjury was alleged to have been committed in the trial of a "suit, controversy, or investigation, without a definite statement of the nature of the proceeding, the words, "suit, controversy, or investigation," under this section, may be regarded as surplusage in a bill of indictment charging perjury, and a motion to quash upon the ground that there was indefiniteness of statement of the nature of the proceeding will not be sustained. *State v. Hawley*, 186 N. C. 433, 119 S. E. 888.

#### § 4617. Former conviction alleged in bill for second offense.

**No Presumption of Second Conviction.**—The first conviction of man-



ufacturing or aiding and abetting in the manufacture of spirituous, etc., liquors is a misdemeanor, and the second is a felony, S. C., 3409; and where the indictment does not charge a previous conviction it will be presumed that the defendant has not heretofore been convicted of the offense charged. *State v. Clark*, 183 N. C. 733, 110 S. E. 641.

### § 4621. Intent to defraud; larceny and receiving.

**In General.**—An indictment charging the employee with the indictable offense of making a false entry on the books of a bank for which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, "and other persons to the jurors unknown," it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were present making an examination of his books, both under the common law and the statute. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47.

### § 4622. Separate counts; consolidation.

See note to § 4647. As to punishment, see § 3789.

**General Verdict Covers Several Counts.**—Where there are several counts in a criminal complaint (called indictment in this case), and each is for a distinct offense, a general verdict of guilty will apply to each, and a judgment rendered as to each count will be sustained for the separate offenses. *State v. Mills*, 181 N. C. 530, 106 S. E. 677.

**Obstructing Highway and Injury to Property.**—It is not only proper but it is the duty of the court to consolidate cases where defendant is charged with obstructing a highway and with wanton injury to personal property by placing nails in the highway. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248.

**Delivering Liquor and Keeping for Sale.**—Under this section consolidation of charges of delivering, and keeping for sale under the Turlington Act 3411(b) is proper. *State v. Jarrett*, 189 N. C. 516, 127 S. E. 590.

**Arson and House Burning.**—Where the grand jury has found two separate indictments, one charging arson and the other the less offense of house burning, both arising from the same transaction, the two may be consolidated and a conviction of the less offense will be sustained on appeal. *State v. Brown*, 182 N. C. 761, 108 S. E. 349.

### § 4625. Defects which do not vitiate.

**In General.**—The refined technicalities of the procedure at common law, in both civil and criminal cases, have most entirely, if not quite, been abolished by our statute. *State v. Hedgecock*, 185 N. C. 714, 117 S. E. 47.

Chief Justice Ruffin, with his strong common sense in the administration of the law says: "This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality and refinement, which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law have before called nice objections of this sort a disease of the law, and a reproach to the bench and lament that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, and especially those for felonies, exceptions extremely refined and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them and only requires the substance, that is a direct averment of those facts and circumstances which constitute the crime to be set forth. It is to be remarked that the act directs the court to proceed to judgment without regard to two things—the one, form, the other, refinement." These clear expressions by this eminent judge have been often quoted since in the opinions of this court. *State v. Lemons*, 182 N. C. 828, 830, 109 S. E. 27.

**Charging Time.**—Time is not the essence of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. *State v. Spencer*, 185 N. C. 765, 117 S. E. 803.

**Conclusion of Indictment.**—Where the indictment sufficiently sets forth the facts under which the defendant is charged with the offense of violating the regulations of the board of fish commissioners, passed at various times, contrary to the form thereof, it is sufficient to sustain a conviction, though in better form had it added "contrary to the statute in such case made and provided," but this is not required under the provisions of this section. *State v. Dudley*, 182 N. C. 822, 109 S. E. 63.

## ART. 15. TRIAL IN SUPERIOR COURT

### § 4633. Peremptory challenges of jurors by defendant.

**Purpose.**—The legislative intent in the enactment of this section is to secure a reasonable and impartial verdict. *State v. Ashburn*, 187 N. C. 717, 122 S. E. 833. See note of this case under section 4634.

### § 4634. Peremptory challenges by the state.

**Construed with Section 2325.**—The effect of section 2325, was to permit a party to a criminal action to make inquiry as to the fitness and competency of a juror before the adverse party would be permitted to admit the cause and have him stood aside therefor, and this course cannot now be pursued, except where the challenging party, after making such inquiry, states that the juror is challenged for cause; and this section abolishing the established practice permitting the solicitor to place jurors, upon the trial of a capital felony, at the foot of the panel, does not affect the application of section 2325, to the trial of such felonies. *State v. Ashburn*, 187 N. C. 717, 122 S. E. 833.

### § 4637. Term expiring during trial extended.

**Daily entries on the journal** during the trial of a felony, stating the name of the case and that the court takes a recess "until 9:30 tomorrow," and the entry next day "court convened at 9:30 a. m. pursuant to recess," etc., in regular form, constitutes a sufficient compliance with this section *State v. Harris*, 181 N. C. 600, 107 S. E. 466.

### § 4639. Conviction of assault, when included in charge.

See notes to § 4640.

**Failure to Charge Upon Lesser Degree.**—The error of the judge in failing to charge on the supporting evidence, upon the lesser degree of the crime of rape, under a charge thereof in the indictment, is not cured by the verdict finding that the defendant was guilty of the greater degree of the crime charged in the indictment. *State v. Williams*, 185 N. C. 685, 116 S. E. 736.

**Applied in** *State v. Hill*, 181 N. C. 558, 560, 107 S. E. 140; *State v. Williams*, 185 N. C. 685, 116 S. E. 736.

### § 4640. Conviction for a less degree or an attempt.

See notes to section 4639.

**Intent Alone Not Sufficient.**—The intent, though connected with preparations to commit a criminal offense, is not alone sufficient for a conviction of the attempt, unless connection with some overt act or acts towards the end in view that will, in the judgment of the one charged, and as matters appeared to him, result in the consummation of the contemplated purpose. *State v. Addor*, 183 N. C. 687, 110 S. E. 650.

Upon the trial for an attempt to violate our statute in the manufacture of



intoxicating liquor, it was established by a special verdict that the defendants placed a bag of meal and nailed a coffee mill to a tree at the place of intended operation, with intent to manufacture the liquor, but that they had no still, but had a promise of one later, it was held that this was insufficient to sustain a judgment of guilty of an attempt to commit the offense charged. *State v. Addor*, 183 N. C. 687, 110 S. E. 650.

**Failure to Charge As to Lesser Degrees of Offense.**—When upon a trial for rape there is evidence that the defendant accomplished his purpose by overcoming the resistance of the prosecutrix by force and coercing her, with the use of a pistol, to submit to his embraces, it is the duty of the court to charge on the supporting evidence as to the lesser degrees of the crime, i. e., assault with intent, assault with a deadly weapon, assault upon a female, etc., and his failure to do so upon defendant's request or otherwise constitutes reversible error. *State v. Williams*, 185 N. C. 685, 116 S. E. 736.

Under the provisions of this section when the bill of indictment is sufficient with the supporting evidence upon the trial, the defendant may be convicted of the criminal offense charged or of a lesser degree thereof, he is entitled to a charge from the court on all degrees of the crime thus encompassed by the indictment; and an error in failing to charge upon the lesser degrees of the crime is not cured by a verdict of conviction upon one of a greater degree. *State v. Robinson*, 188 N. C. 784, 125 S. E. 617.

**Indictment for Attempt or Complete Offense.**—An attempt to commit a crime is an indictable offense, and on proper evidence, a conviction may be sustained on a bill of indictment making a specific and sufficient charge thereof, or one which charges a complete offense. *State v. Addor*, 183 N. C. 687, 110 S. E. 650.

**Arson—Accessory Before the Fact.**—The petitioner for a certiorari as a substitute for an appeal was charged with arson, and upon the trial of another charged with the same offense, and as an accessory before the fact, he testified of his own free will, after being warned and without inducement, that he had burned the dwelling, being induced thereto by the prisoner then being tried; and on his own trial, that he had not done the burning, etc.: *Semble*, this conflict of testimony involved a finding of fact that his first testimony was perjured; and further, the charge of accessory before the fact includes that of the principal crime, and the court could accept the plea of defendant under the charge of arson; and, therefore, no error of law would be found regarding the case as if on appeal, upon its merits. *State v. Simons*, 179 N. C. 700, 103 S. E. 5.

**Charge as to Assault Unnecessary Where Homicide Admitted.**—While under the provisions of this section the trial judge is required to charge upon evidence on the less degrees of the same crime concerning which the prisoner was being tried, it is not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner is charged with murder, and the killing of the deceased by him has been admitted, and the judge has correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. C. S., 4201. *State v. Lutterloh*, 188 N. C. 412, 124 S. E. 752.

**Applied** to assault with a deadly weapon with intent to kill. *State v. Shemwell*, 180 N. C. 718, 104 S. E. 885.

## § 4643. Demurrer to the evidence.

**In General.**—This section serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by C. S., 567, in civil actions. Originally, under this latter section, in case to which it was applicable, there was considerable doubt as to whether a plea of contributory negligence—the burden of such issue being on the defendant—could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is estab-

lished by his own evidence, as he thus proves himself out of court. *State v. Flucher*, 184 N. C. 663, 665, 113 S. E. 769.

**Renewal of Motion.**—A motion as of nonsuit upon the evidence will not be considered when it is not renewed after the conclusion of all the evidence, as this section requires. *State v. Helms*, 181 N. C. 566, 107 S. E. 228.

Where the defendant in a criminal action moves for the dismissal or for judgment as of nonsuit after the close of the State's evidence, and thereafter elects to introduce his own evidence, his failure to renew his motion after the whole evidence has been introduced is a waiver of his right to insist upon his first exception, and it is not subject to review in the Supreme Court on appeal. *State v. Hayes*, 187 N. C. 490, 122 S. E. 13.

**Conflicting Evidence.**—Where the prosecutor's goods have been stolen two days before, they are found in the defendant's possession, with conflicting evidence upon the question of his having stolen them, the case can only be determined by the jury, and the defendant's motion under this section to dismiss must be denied. *State v. Jenkins*, 182 N. C. 818, 108 S. E. 767.

**Excepting to Entire Evidence.**—Where a defendant in a criminal action desires to except to the sufficiency of the evidence to convict him, his excepting, under this section, at the close of the State's evidence, and upon the overruling of his motion to nonsuit, excepting at the close of all the evidence brings his exception, to the Supreme Court on appeal, upon the sufficiency of the entire evidence to convict, and is the proper procedure for that purpose. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755.

**Consideration of Entire Evidence on Appeal.**—In *State v. Pasour*, 183 N. C. 793, 794, 111 S. E. 779, the court said: "Both before and after he had introduced evidence, the defendant moved to dismiss the prosecution as in case of nonsuit, and duly excepted to the court's denial of his motion. The exceptions, therefore, require a consideration of the entire evidence."

An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any sufficient evidence on the whole record of the defendant's guilt. *State v. Brinkley*, 183 N. C. 720, 110 S. E. 783.

**Sufficiency of Evidence.**—Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorably to the State and the court will not pass upon its weight or the credibility of the witnesses. *State v. Rountree*, 181 N. C. 535, 106 S. E. 669.

**Same—Tending Only to Exculpate.**—Where the State's evidence and that of the defendant are substantially to the same effect, in an action for an assault, and tend only to exculpate the defendant, his motion as of nonsuit after all the evidence has been introduced, considering it as a whole, should be sustained. *State v. Fulcher*, 184 N. C. 663, 113 S. E. 769.

**Same—Father Shielding Child.**—The father may shield his child from assault of another to the extent necessary for the purpose without himself being guilty of an assault; and where he has done so, without the use of excessive force, as appears from all the evidence in the case, his motion as of nonsuit at the close of his evidence should be granted. *State v. Fulcher*, 184 N. C. 663, 113 S. E. 769.

**Same—Unlawful Restaurant.**—*State v. Shoaf*, 179 N. C. 744, 102 S. E. 704.

**Same—Recent Possession of Stolen Goods.**—Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of section 4235, and defendant's demurrer to the State's evidence or motion for dismissal thereon, is properly overruled. *State v. Williams*, 187 N. C. 492, 122 S. E. 13.



**Same—Reckless Driving.**—Evidence that the defendant, while driving his automobile at night at about 30 or 35 miles an hour, along a public highway, without lights, signals, or other warnings of approach, suddenly appeared and struck and killed a lad, going in the opposite direction, who was walking along the edge of the highway in a line with other boys, by turning in and out among them, is sufficient evidence to take the issue of murder to the jury, and to sustain a verdict of manslaughter, and to deny defendant's motion as of nonsuit under the provisions of this section. The decisions of reckless driving of automobiles upon the public highways of the State in violation of statute, cited and applied. *State v. Crutchfield*, 187 N. C. 607, 122 S. E. 391.

## ART. 16. APPEAL

### § 4647. Appeal from justice; trial de novo.

See notes to § 661.

**Bill of Indictment Unnecessary.**—Upon an appeal from an inferior court to the Supreme Court from a conviction of a petty misdemeanor, the necessity of a bill of indictment in the latter court is dispensed with. *State v. Jones*, 181 N. C. 543, 106 S. E. 827.

**Amendment to Complaint.**—Where the defendant has been separately tried before a justice of the peace for the several acts made indictable under section 2618, as to unlawful speeding upon public highways and streets, it is premissible for the Superior Court, on appeal, to allow an amendment to the complaint or warrant so as to make one complaint include the several offenses under different counts. *State v. Mills*, 181 N. C. 530, 106 S. E. 679.

### § 4649. When state may appeal.

**Arrest of Judgment.**—Applied in *State v. Hall*, 183 N. C. 806, 112 S. E.

### § 4653. Bail pending appeal.

**In General.**—But for this section an accused would have no right to bail pending an appeal. *State v. Bradsher*, 189 N. C. 401, 127 S. E. 349.

## ART. 17. EXECUTION

### § 4660. A guard or guards or other person to be named and designated by the warden to execute sentence.

Some guard or guards or other reliable person or persons to be named and designated by the warden from time to time shall cause the person, convict or felon against whom the death sentence has been so pronounced to be electrocuted as provided by this article and all amendments thereto. The electrocution shall be under the general supervision and control of the warden of the penitentiary, who shall from time to time, in writing, name and designate the guard or guards or other reliable person or persons who shall cause the person, convict or felon against whom the death sentence has been pronounced to be electrocuted as provided by this article and all amendments thereto. At such execution there shall be present the warden or deputy warden or some person designated by the warden in his stead; the surgeon or physician of the penitentiary and six respectable citizens, the counsel and any relatives of such person, convict or

felon and a minister or ministers of the gospel may be present if they so desire, and the board of directors of the penitentiary may provide for and pay the fee for each execution not to exceed thirty-five dollars (\$35.00). (1909, c. 443, s. 4; 1925, c. 123.)

**Editor's Note.**—Prior to the act of 1925 the warden was required to execute the sentence. He is now required to designate guards for that duty and to supervise the execution.

### **§ 4663. Judgment sustained on appeal, reprieve, time for execution.**

In case of an appeal, should the Supreme Court find no error in the trial, or should the stay of execution granted by any competent judicial tribunal or proceeding, or reprieve by the Governor, have expired or terminated, such condemned person, convict or felon shall be executed, in the manner heretofore provided in this article, upon the third Friday after the filing of the opinion or order of the Supreme Court or other competent judicial tribunal as aforesaid, or, in case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided in this article upon the third Friday after the expiration or termination of such reprieve; and it shall be the duty of the clerk of the Supreme Court, and of any other competent tribunal, as aforesaid, or the clerk thereof, to notify the warden of the penitentiary of the date of the filing of the opinion or order of such court or other judicial tribunal, and in case of a reprieve by the Governor, it shall be the duty of the Governor to give notice to the warden of the State Penitentiary of the date of the expiration of such reprieve. (1909, c. 443, s. 6; 1925, ch. 55.)

**Editor's Note.**—Formerly in case of an appeal, the conviction being sustained, the governor was required to set the date. It is now the 3rd Friday after the filing of the opinion or order affirming the conviction. The provision as to reprieve is new with the act of 1925.

### **§ 4665. Disposition of body.**

Upon application, written or verbal, of any relative as near as the degree of fourth cousin of the person executed, made at any time prior to the execution or on the morning thereof, the body, after execution, shall be prepared for burial under the supervision of the warden or deputy warden and shall be returned to the nearest railroad station of the relative or relatives asking for such body. In the event that no relative asks for the body of such executed person, convict or felon, the same shall be disposed of as other bodies of convicts dying in the penitentiary. (1909, c. 443, s. 9; 1925, c. 275, s. 6.)

**Editor's Note.**—This section formerly contained a provision as to cost of preparing body and transportation. This was omitted by the act of 1925.



## CHAPTER 84

**AGRICULTURE**

## ART. 1. DEPARTMENT OF AGRICULTURE

**§ 4680. Purpose of the committee.**

It shall be the purpose of the joint committee for agricultural work to prevent duplication and to maintain greater coöperation on the part of the North Carolina State College of Agriculture and Engineering and the State Department of Agriculture, Immigration and Statistics; and the joint committee shall have authority to settle any and all questions relative to jurisdiction or duplication of work that may be referred to it by either the president of the college or the Commissioner of Agriculture, and the decision of the joint committee not inconsistent with the law shall be binding on both institutions. The joint committee shall meet at least once each year at the call of the chairman to receive reports from the president of the college and the Commissioner of Agriculture on the relation of the two institutions with special reference to the research or any other work in which the two institutions are interested, and to make recommendations to the governing bodies of each that may tend to increase their coöperation in promoting agricultural improvement in the State. (1913, c. 18, ss. 3, 4; 1925, c. 142, s. 1.)

**Editor's Note.**—The section as amended by the act of 1925 is entirely new in form, although the purpose of the committee remains substantially the same. The provision for meetings and their purpose, and for settling by the committee of questions referred to it are new. A sentence allowing the employment of workers was omitted.

**§ 4681. Funds for research work.**

After the Board of Agriculture has provided for the work of its several departments each year in accordance with law, the remainder of the funds received by the Department of Agriculture shall be apportioned for agricultural research work, including such experiments, investigations and tests as may be deemed important.

(a) For the year nineteen hundred and twenty-five-twenty-six, the sum of sixty thousand dollars shall be appropriated for research work to be conducted for the Department of Agriculture by the North Carolina State College of Agriculture and Engineering, this being approximately the amount appropriated by the Board of Agriculture to the college for the year nineteen hundred and twenty-four-twenty-five, and the amount that the Board of Agriculture agrees to appropriate to the college for research work for the fiscal year nineteen hundred and twenty-five-twenty-six.

(b) On or before June first, one thousand nine hundred and twenty-six, and each year thereafter, the State Board of Agriculture shall estimate the amount that shall be available for research work, including tests, experiments and investigations to be conducted by

the college for the Department of Agriculture for the next ensuing year, and shall certify the amount to the president of the college: *Provided*, if the Board of Agriculture shall fail to certify the amount as provided in this subsection, the same amount appropriated to the college for the current year shall be appropriated for the next ensuing year.

(c) The joint committee on agricultural work shall determine how the funds appropriated to the college shall be disbursed and the Commissioner of Agriculture is authorized and directed to make requisitions on the State Treasurer payable to the treasurer of the college in the manner approved by the joint committee.

(d) The president of the college shall transmit annually to the Commissioner of Agriculture a report of the research and other work conducted by the college from funds derived from the Department of Agriculture. (1925, c. 142, s. 2.)

**Editor's Note.**—The entire section is new the old section numbered 4681, being repealed and this one substituted by the legislature. It is in no sense amendatory.

### § 4688. Joint duties of commissioner and board.

The regulation of a quarantine district laid and enforced in pursuance of this section and section 4783, for the eradication of ticks on cattle is a reasonable and valid regulation. *State v. Hodges*, 180 N. C. 751, 105 S. E. 417.

### § 4688 (a). Executive duties transferred from board to commissioner of agriculture.

In all laws, rules and regulations passed by the General Assembly of North Carolina and placed in the State Department of Agriculture for enforcement, where the context clearly states or implies the invocation of executive authority or executive action, such as selecting the workers of the department and appointing same, the execution of the regulations of the Board of Agriculture and the enforcing of the Laws of the General Assembly, and any other duties that are clearly executive in their nature, the words "Board of Agriculture," whenever they occur in such connection, shall be and are hereby changed to "Commissioner of Agriculture" in all cases where executive and not legislative action is clearly indicated. (1925, c. 174, s. 1.)

## ART. 2. COMMERCIAL FERTILIZERS

### § 4697. Collection and analysis of samples; analyst's certificate as evidence.

**Constitutionality.**—This section, does not impair the right of contract, and is constitutional and valid. *Armour Fertilizer Works v. Aiken*, 175 N. C. 398, 95 S. E. 657; *American Fertilizing Co. v. Thomas*, 181 N. C. 274, 106 S. E. 835, cited and approved. *Jones v. Union Guano Co.*, 183 N. C. 338, 111 S. E. 612; *Pearsall & Co. v. Eakins*, 184 N. C. 291, 114 S. E. 291.

**Evidence of Deficiency.**—In order to recover damages to the crops caused by the use of fertilizer containing a harmful deficiency of its in-



gredients, contrary to the seller's warrant, this section, with its recent amendments, requires evidence of its analysis, showing the alleged deficiency, made by the State Agricultural Department, and whether sold upon a special contract, not waiving the benefit of the section, or under the protection of the section alone, such evidence is essential to defendant's recovery upon a counterclaim set up by him in plaintiff's action upon the note for the purchase price. *Pearsall & Co. v. Eakins*, 184 N. C. 291, 114 S. E. 291.

**Analysis Made Conclusive by Contract.**—Where it appears from the contract of sale of fertilizer that the vendor's warranty was that the goods should come up to the analysis upon the bags, and any deficiency should be determined by the analysis of the State Chemist under our statute, which should be conclusive as to damages claimed by the purchasers, and by this test the fertilizer has been found to be free from borax or other matter deleterious to crops, parol evidence tending to show that the fertilizer furnished did contain borax from the appearance or condition of the crop, is properly excluded upon an allegation of fraud, whether it comes from expert witnesses or others, as the analysis, under the agreement of the parties, is conclusive as to the ingredients of the fertilizer, and as to the recovery of damages to the crop it is a bar. *American Fertilizing Co. v. Thomas*, 181 N. C. 274, 106 S. E. 835.

Under the provisions of this section, that the analysis of the State Agricultural Department shall be prima facie proof that the fertilizer was of the value and constituency shown by his analysis, "but that nothing in this article shall impair the right of contract," leaves it open for the parties to make their own terms by contract as to damages to the crop to be grown upon the lands, but parol evidence to show damage to crops is properly excluded when the parties by their contract have expressly agreed that the analysis of the State Chemist shall be the only test as to the quality of the fertilizer, and it has been thereby ascertained that the fertilizer furnished was in accordance with the contract. *American Fertilizing Co. v. Thomas*, 181 N. C. 274, 106 S. E. 835.

**Same—Exclusion of Parol Evidence.**—A contract for the sale of fertilizer, specifying that the customer could only recover the difference between the contract price and the actual value of the goods in case of deficient analysis, to be determined by the State Agricultural Department from samples furnished by the customer, which analysis shall be conclusive as the best and only test, both by this section and the contract, excludes parol evidence as to the effect the fertilizer had upon the crop grown upon the land, or as to the fertilizer containing an injurious element which the analysis and certificate made by the State Chemist expressly excluded. *American Fertilizing Co. v. Thomas*, 181 N. C. 274, 106 S. E. 835.

## ART. 6. STOCK AND POULTRY TONICS

### § 4742. Application and affidavit for registration.

**Note Uncollectible for Noncompliance.**—Where a note is given in consideration of the sale of a foodstuff or "conditioner" coming within the provisions of this section, requiring the seller to file with the Commissioner of Agriculture a statement of his purpose, a duly verified certificate as to its qualities, for registration, with a labeled package, section 4743 requiring a fee for registration, section 4744 making a noncompliance a misdemeanor, and section 4749 declaring the legislation designed to protect the public from deception and fraud, and these requirements have not been complied with by the seller, the note is uncollectible against the purchaser or maker. *Miller v. Howell*, 184 N. C. 119, 113 S. E. 621.

## ART. 7(A) SLAUGHTERING OF MEAT-PRODUCING ANIMALS

**§ 4768 (a). Application for permit.**

Any persons, firms or corporations engaged in the slaughter of meat-producing animals within the State of North Carolina, may make application to the Commissioner of Agriculture for a permit to transport, convey, and sell their products at any place within the limits of the State of North Carolina. (1925, c. 181, s. 1.)

**§ 4768 (b). Investigation of sanitary conditions; issuance of permit.**

It shall be the duty of the Commissioner of Agriculture, on receipt of such application described above, to cause to be made a thorough investigation of the sanitary conditions existing in such establishment, the efficiency of the inspection provided, and the manner in which the food products of such establishment are slaughtered and prepared. If such establishment is found to be operating in accordance with the regulations of the Commissioner of Agriculture as provided for in this article, a numbered permit shall be issued to the persons, firms, or corporations making application for same. (1925, c. 181, s. 2.)

**§ 4768 (c). Municipalities, inspection of meats.**

Municipal corporations shall have power and authority under this article to establish and maintain the inspection of meats and meat products, at establishments located within their corporate limits, and county commissioners shall have power and authority to establish and maintain inspection of meats and meat products at establishments not located in municipal corporations, but located within the boundaries of their county. (1925, c. 181, s. 3.)

**§ 4768 (d). Fees for inspection.**

The officials of municipalities or counties in which such inspection is maintained, shall have full power and authority to fix and collect fees for inspection of any and all meat animals or meat products necessary to the maintenance of such inspection, but no further inspection shall be made within the State. (1925, c. 181, s. 4.)

**§ 4768 (e). Inspection conducted by veterinarian.**

No permit shall be issued to any establishment except where the meat inspection is conducted under the supervision of a graduate veterinarian approved by the State Veterinarian of North Carolina or the North Carolina Veterinary Medical Examining Board. (1925, c. 181, s. 5.)

**§ 4768 (f). Number of permit to identify meats; revocation of permit.**

To each establishment complying with the provisions of this article, the numbered permit shall be the establishment's official State



number, and such number may be used to identify all passed meats and meat products prepared in such establishment. Such permit may be revoked by the Commissioner of Agriculture at any time when the establishment issuing such permit violates any of the regulations prescribed for efficient inspection and sanitation. (1925, c. 181, s. 6.)

**§ 4768 (g). Carcasses marked when inspected.**

All meat carcasses inspected and passed in accordance with this article shall be branded with a rubber stamp bearing the number of the establishment and the words "N. C. Inspected and Passed." (1925, c. 181, s. 7.)

**§ 4768 (h). Rules and regulations for inspection; power of commissioner.**

The Commissioner of Agriculture shall have full power and authority to make and adopt all necessary rules and regulations for the efficient inspection, preparation and handling of meats and meat products in such establishments, and for the disposal of all condemned meats, and such rules and regulations shall govern the inspection of all meats and meat products at establishments operating under this article. (1925, c. 181, s. 8.)

ART. 7(B) MEAT PACKING ESTABLISHMENTS

**§ 4768 (i). Inspection; meat stamped as approved or condemned.**

All persons, firms, or corporations engaged in the business of operating a meat packing plant or plants within the State of North Carolina where more than one thousand beef cattle are slaughtered per annum, or more than ten thousand hogs or swine are slaughtered per annum, or more than five hundred sheep are slaughtered per annum shall have the meat or beef of said slaughtered cattle inspected by a veterinary surgeon duly licensed by the State of North Carolina; that said inspector shall be elected by the governing body of the municipal corporation wherein said packing plant or plants is or are situated, or, if said packing plant be not situated within a municipal corporation, then by the board of county commissioners of the county wherein said packing plant is situated. Said inspector shall condemn all meats found to be unfit for human consumption. Said inspector shall cause all meats so condemned either to be destroyed or put to some use which shall not be dangerous for the public health. Each and every piece of meat or beef not condemned by said inspector shall be stamped by him in the usual manner; that the stamp to be used to stamp said meat or beef shall bear the following words: "North Carolina State Meat Inspection—Approved (*insert name of inspector*), Inspector". All meat or beef condemned by said inspector shall be stamped by a similar stamp, except that the word "condemned" shall be inserted thereon instead of the word "approved." (1924, c. 11, s. 1.)

**§ 4768 (j). Fees for inspection.**

The charges for said inspection shall be as follows: twenty-five cents for each and every beef cattle or cow inspected; ten cents for each and every hog inspected, and ten cents for each and every sheep inspected; [ten cents for each and every veal calf respectively;] no further inspection shall be necessary within the State except such inspection as is provided for in section four thousand seven hundred and sixty-two of the Consolidated Statutes of North Carolina. No further or other inspection charges for the inspection of meat or beef inspected as provided herein shall be made within the State. (1925, c. 11, s. 2; 1925, c. 311.)

**§ 4768 (k). Veterinary not available; who to inspect.**

Should no regularly licensed veterinary surgeon be available for the purposes of this article, then the duties provided herein to be performed by said inspector shall be performed by some competent person to be elected by the governing body of the municipal corporation wherein said packing plant is located, or if said packing plant be not located within a municipal corporation, then by the board of county commissioners of the county wherein said packing plant is located. (1925, c. 11, s. 3.)

**§ 4768 (l). Collection of fees; remuneration of inspector.**

The fees or inspection charges herein provided for shall be collected by the municipal corporation wherein said packing plant is located, or if said packing plant be not located within a municipal corporation, then by the board of county commissioners of the county wherein said plant is located. Said fees or charges so collected shall be placed in the general fund of the municipal corporation or county collecting the same. The salary or remuneration of the inspector shall be fixed and paid by the municipal corporation or county by which said inspector is elected. (1925, c. 11, s. 4.)

**ART. 15. ANIMAL DISEASES****§ 4873. Rules to enforce quarantine.**

**Cattle Ticks.**—The regulation of quarantine district laid and enforced in pursuance of C. S., 4688 (3) and this section, for the eradication of ticks on cattle is a reasonable and valid regulation. *State v. Hodges*, 180 N. C. 751, 105 S. E. 417.

**§ 4895. Appropriation to pay indemnities.**

(Repealed: 1925, c. 275, s. 6.)

**§ 4895 (t). Local state inspectors; commissioning as quarantine inspectors; salaries, etc.**

The state veterinarian shall appoint the necessary number of local state inspectors to assist in systematic tick eradication, who shall be commissioned by the commissioner of agriculture as quarantine in-



spectors. The salaries of said inspectors shall be fixed by the state veterinarian and shall be sufficient to insure the employment of competent men. If the services of any of said inspectors is not satisfactory to the state veterinarian, his services shall be immediately discontinued and his commission canceled. (1923, c. 146, s. 5; 1925, c. 275, s. 6.)

**Editor's Note.**—By the Act of 1925, a sentence appropriating annually a sum to pay salaries of inspectors was omitted.

## ART. 18. MARKETING COTTON

### § 4925 (d). Bonds of superintendent and employees.

See note to § 4925(e).

**Fraudulent Negotiation of Warehouse Receipt.** — Where the superintendent of a warehouse delivers cotton, takes the endorsed receipts and instead of cancelling them negotiates a loan for his own benefit pledging the receipts as collateral, this is a clear breach of his duty for which an action on his bond will lie. *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 216 S. E. 316.

### § 4925 (e). Fund for support of system; collection and investment.

**Recovery on Bond.**—Where a warehouse superintendent fraudulently negotiates spent warehouse receipts and the bona fide holder thereof recovers from the indemnifying fund provided by this section, the state may recover on the bond of the superintendent. The bond is the fund primarily liable. *Lacy v. Globe Indemnity Co.*, 189 N. C. 24, 26 S. E. 316.

### § 4925 (k). Cotton to be graded, stapled, and weighed. Negotiable receipts. Authentication of receipts.

As soon as possible after any lint cotton, properly baled, is received for storage, the local manager shall, if not previously done, have it graded and stapled by a federal or state classifier and legally weighed. Official negotiable receipts of the form and design approved by the board of agriculture shall be issued for such cotton under the seal and in the name of the state of North Carolina, stating location of warehouse, name of manager, the mark on said bale, weight, grade, and length of staple, so as to be able to deliver on surrender of the receipt the identical cotton for which it was given. [Provided, on request of the depositor, a negotiable receipt may be issued omitting the statement of grade and staple; such receipt to be stamped on its face: "not graded or stamped on request of the depositor."] The warehouse manager shall fill in the said receipt, which shall be signed by him and by the state warehouse superintendent or his duly authorized agent: *Provided*, that if the local manager cannot issue a negotiable receipt complete for such cotton, he shall issue a nonnegotiable memorandum receipt therefor, said memorandum receipt to be taken up and marked "Canceled" by the local manager upon the delivery of the negotiable receipt issued for said cotton: *Provided further*, that if the official negotiable receipt be issued for cotton of which the manager is owner, either solely or

jointly in common with others, the fact of such ownership must appear on the face of the receipt: *Provided further*, that no responsibility is assumed by the state warehouse system for fluctuations in weight due to natural causes. (1921, c. 137, s. 11; 1925, c. 225.)

### **§ 4925 (1). Transfer of receipt; issuance and effect of receipt.**

As to negotiability of receipts see note to § 3010. As to failure to cancel, see note to § 4925(d).

## **ART. 20. BOYS' ROAD PATROL**

### **§ 4931. Boys' road patrol authorized.**

The [State Board of Education, whose duty it shall be to appoint a director of the work of the boys' road patrol in the State of North Carolina] is hereby charged with the duty of authorizing a brigade of school boys in this state to be called the Boys' Road Patrol, and to be composed of boys who attend the rural public schools of the state. (1915, c. 239, s. 1; 1925, c. 300, s. 1.)

### **§ 4932. Duties of patrol.**

The duties of such patrol to be to look after the maintenance of the road lying near the home of each member of the patrol, dragging and ditching same by the use of machinery placed in the care of the patrol by the state and county in such manner as the [State Board of Education] shall direct [and prevent forest fires by extinguishing fire along the public highway]. (1915, c. 239, s. 2; 1925, c. 300, s. 2.)

### **§ 4933. Regulations for patrol; prizes authorized.**

The [State Board of Education] is specially empowered and directed to devise, organize, and adopt all such rules and regulations as may be necessary for effectually carrying out the purposes of this article; may award suitable prizes and pay all expenses of successful competitors and others engaged in such work in attendance upon meetings and other purposes. (1915, c. 239, s. 3; 1925, c. 300, s. 3.)

### **§ 4934. Funds for support.**

All moneys for the carrying out of this article shall be provided by the counties themselves in coöperation with the [State of North Carolina]. The commissioners of the counties of North Carolina are empowered to make annual donations out of the county funds for the purposes of this article. (1915, c. 239, ss. 4, 6; 1925, c. 300, s. 4.)

### **§ 4935. Minimum preliminary appropriation by county.**

Said brigade shall not be organized in any county until the com-



missioners of said county set apart and appropriate not less than one hundred dollars for the purposes of this article, to be spent in said county by the [State Board of Education]. 1915, c. 239, s. 5; 1925, c. 300, s. 5.)

#### ART. 21. AGRICULTURAL SOCIETIES AND FAIRS

##### § 4937. Officers; appointment and terms.

Such corporation shall have a board of directors, which shall consist of seventeen members, five of whom shall be *ex officio* as follows: The Governor of North Carolina, the president of the North Carolina State College of Agriculture and Engineering, the Commissioner of Agriculture, the mayor of the city of Raleigh, and the president of the North Carolina Agricultural Society; the remaining members of the board of directors shall be appointed as follows: two by the Governor of North Carolina; two by the president of the North Carolina State College of Agriculture and Engineering; two by the Commissioner of Agriculture; four by the members of the North Carolina Agricultural Society, and two by the mayor of the city of Raleigh. The directors shall hold office for one year and until their successors are elected and qualified and shall have the usual powers with reference to the affairs of the society as do directors of other corporations, and shall elect officers of the society in such manner as the by-laws of the society may prescribe. (Rev., s. 863; Code, s. 2214; R. C., c. 2, s. 1; 1852, c. 1, ss. 1, 3; 1925, c. 126.)

**Editor's Note.**—Prior to Act of 1925, the corporation elected annually, a president, four vice presidents, a treasurer, recording secretary, corresponding secretary and other officers necessary. Now the board of directors, some holding office *ex officio* and others being appointed, elect officers as the by-laws prescribe.

##### § 4940. Appropriations from state.

(Repealed: 1925, c. 275, s. 6.)

##### § 4943. Appropriation from state; payment.

(Repealed: 1925, c. 275, s. 6.)

##### § 4949. Albemarle agricultural and fish association; appropriation.

(Repealed: 1925, c. 275, s. 6.)

##### §§ 4949 (a)-4949 (f). Appropriations for fairs.

(Repealed: 1925, c. 275, s. 6.)

#### ART. 22. COTTON STATES COMMISSION.

##### §§ 4958 (a)-4958 (n). Cotton states commission.

(Repealed: 1925, c. 275, s. 6.)

## CHAPTER 88

**BOARD OF CHARITIES**

## ART. 1. STATE BOARD OF CHARITIES AND PUBLIC WELFARE

**§ 5006. Powers and duties of board.**

The board shall have the following powers and duties, to-wit:

1. To investigate and supervise, through and by its own members or its agents or employees, the whole system of the charitable and penal institutions of the state, and to recommend such changes and additional provision as it may deem needful for their economical and efficient administration.

2. To study the subjects of nonemployment, poverty, vagrancy, housing conditions, crime, public amusement, care and treatment of prisoners, divorce and wife desertion, the social evil and kindred subjects and their causes, treatment, and prevention, and the prevention of any hurtful social condition.

3. To study and promote the welfare of the dependent and delinquent child and to provide, either directly or through a bureau of the board, for the placing and supervision of dependent, delinquent, and defective children.

4. To inspect and make report on private orphanages, institutions, maternity homes, and persons or organizations receiving and placing children, and to require such institutions to submit such [annual] reports and information as the state board may determine.

5. To grant license for one year to such persons or agencies to carry on such work as it believes is needed and is for the public good, and is conducted by reputable persons or organizations, and to revoke such license when in its opinion the public welfare or the good of the children therein is not being properly subserved; [*Provided*, subsection five shall not apply to any orphanage chartered by the laws of the State of North Carolina, owned by a religious denomination or a fraternal order, and having a plant and assets not less than sixty thousand dollars (\$60,000), nor shall it apply to orphanages operated by fraternal orders, under charters of other states, which have complied with the corporation laws of North Carolina and have that amount of property].

6. To issue bulletins and have same printed to such amount and extent as may be approved by the state printing commission, and in other ways to inform the public as to social conditions and the proper treatment and remedies for social evils.

7. To issue subpoenas and compel attendance of witnesses, administer oaths, and to send for persons and papers whenever it deems it necessary in making the investigations provided for herein or in the other discharge of its duties, and to give such publicity to its investigations and findings as it may deem best for the public welfare.

8. To employ a trained investigator of social service problems who



shall be known as the commissioner of public welfare, and to employ such other inspectors, officers, and agents as it may deem needful in the discharge of its duties.

9. To recommend to the legislature social legislation and the creation of necessary institutions.

10. To encourage employment by counties a county superintendent of public welfare and to coöperate with the county superintendent of public welfare in every way possible.

11. To attend, either through its members or agents, social service conventions and similar conventions, and to assist in promoting all helpful publicity tending to improve social conditions of the state, and to pay out of the funds appropriated to the state board office expenses, salaries of employees, and all other expenses incurred in carrying out the duties and powers hereinbefore set out. (Rev., ss. 3914, 3915; Code, ss. 2332, 2333; 1868-9, c. 170, s. 3; 1917, c. 170, s. 1; 1919, c. 46, ss. 1, 2; 1925, c. 90, ss. 1, 2.)

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## CHAPTER 90

### CHILD WELFARE

#### ART. 1. CHILD LABOR REGULATIONS

#### § 5032. Employment of children under fourteen regulated.

No child under the age of fourteen years shall be employed or permitted to work in or about or in connection with any mill, factory, cannery, workshop, or manufacturing establishment. No child under the age of fourteen years shall be employed or permitted to work in or about or in connection with any laundry, bakery, mercantile establishment, office, hotel, restaurant, barber shop, boot-black stand, public stable, garage, place of amusement, brick yard, lumber yard, or any messenger or delivery service, public works, or any form of street trades, except in cases and under regulations prescribed by the commission herein created: *Provided*, the employments in this section enumerated shall not be construed to include *bona fide* boys' and girls' canning clubs recognized by the Agricultural Department of this State, or vocational training classes authorized by the State Board of Education, and such canning clubs and vocational classes are hereby expressly exempted from the provisions of this article. (1919, c. 100, s. 7; 1924, c. 74.)

**Editor's Note.**—The Acts of 1924 struck out all of the old section and inserted this one in its stead.

**Messenger or Delivery Service Not Included.**—This section does prohibit the employment of "any one under 14 years of age" in messenger or delivery service. *Pettitt v. Atlantic Coast Line R. Co.*, 186 N. C. 9, 16, 118 S. E. 840.

### § 5033. Prohibited employments of children under sixteen.

No person under sixteen years of age shall be employed, or permitted to work, at night in any of the places or occupations referred to in the first preceding section, between the hours of nine p. m. and six a. m., and no person under sixteen years of age shall be employed or permitted to work in or about or in connection with any quarry or mine. [Nor shall any child under the age of sixteen years be employed, except in cases and under regulations prescribed by the commission herein created, when (1) such child has symptoms of disease contributory to retardation or disability; or (2) when determined by physical examination that employment of such child is injurious to its health; or (3) employed when surrounding conditions are injurious to its morals; or (4) employed when dangerous employment hazards are present.] (1919, c. 100, s. 6; 1924, c. 129, s. 2.)

### § 5034. Age certificates.

No child under the age of sixteen years shall be employed in any of the ways enumerated in this article unless at the time of such employment the employer shall in good faith procure, rely upon, and place on file a certificate issued in such form and under such conditions and by such persons as the said commission herein provided for shall prescribe, showing that the person is of legal age for such employment, and the laws and rules made by the State Child Welfare Commission under authority of this article have been complied with. The possession of such certificate by an employer shall be *prima facie* evidence that he has complied with the requirements and obligations of this article when employing such child. No person shall knowingly make a false statement or present false evidence in, or in relation to any such certificate, or application therefor, or cause any false statement to be made which may result in the issuance of an improper certificate of employment. (1919, c. 100, s. 10; 1924, c. 74.)

**Editor's Note.**—The Acts of 1924 struck out all of the old section and inserted this one in its stead.

### § 5035. Commission may employ agents.

The commission shall have authority to appoint and employ such agents for the purpose of enforcing the provisions of this article as may be found to be necessary, and they may use the county superintendent of public welfare or chief school attendance officer or truant officer of the several counties for the purpose of carrying out such provisions, and they may use the agents specially designated for carrying out the provisions of this article to aid in carrying out the provisions of the general compulsory school attendance law under subchapter (IX) of the chapter on education. [And all agents and officials enumerated in this section shall make complete report of all



official acts done in compliance with this chapter on blanks furnished by the State Child Welfare Commission.] (1919, c. 100, s. 9; 1924, c. 74.)

### § 5037. Expenses of commission.

The state treasurer shall honor all warrants for necessary expenses incurred by the commission for meeting the salaries and expenses of any agents employed by the commission in the enforcement of this article, and the necessary expenses incurred by the commission in carrying out the provisions of this article, out of funds not otherwise appropriated, [such expense so incurred shall not exceed the sum of twenty thousand (\$20,000) per annum, and all necessary printing shall be paid out of the general fund of the State not otherwise appropriated.] (1919, c. 100, s. 11; 1924, c. 74.)

## ART. 2. JUVENILE COURTS

### § 5039. Exclusive original jurisdiction over children.

See note of Clegg *v.* Clegg under § 2241.

**Constitutionality.**—This section and the section following in this article are held to be a constitutional and valid enactment. *State v. Burnett*, 179 N. C. 735, 102 S. E. 711; *In re Coston*, 187 N. C. 509, 122 S. E. 183.

**Purpose.**—This section creating a juvenile court does not deal with delinquent children as criminals, but as wards of the state, and undertakes to give the control and environment that may lead to their reformation and enable them to become law-abiding and useful citizens, and a support and not a hinderance to the commonwealth and the objection that the statute ignores or unlawfully withholds the right to a trial by jury, can not be sustained. *State v. Burnett*, 179 N. C. 735, 102 S. E. 711.

**Repeal of Ch. 122, Laws of 1915.**—This section and the following section of this article establishing a juvenile court, repeal ch. 122, Laws of 1915, and *State v. Newell*, 172 N. C. 933, has no application. *State v. Burnett*, 179 N. C. 735, 102 S. E. 711.

**Capability of Committing Crimes — Duration of Jurisdiction.**—Where the jurisdiction of the juvenile court has once attached it remains during the minority of the youthful offender, for the purpose of his correction and reformation. *State v. Coble*, 181 N. C. 554, 107 S. E. 132; *In re Coston*, 187 N. C. 509, 122 S. E. 183.

**Exclusive Criminal Jurisdiction.**—The juvenile court, as a separate part of the Superior Court, is given by this section, among other things, the sole power to investigate charges of misdemeanors, and of felonies with punishment not exceeding a ten-year imprisonment, made against children between the ages of fourteen and sixteen years, at the time of the offense committed, and excludes the jurisdiction of the justice of the peace to bind them over to the Superior Court in such instances. *State v. Coble* 181 N. C. 554, 107 S. E. 132.

This section gives exclusive original jurisdiction to the Superior Court where the custody of a child less than sixteen years of age is in question and establishes the juvenile courts as separate, though not necessarily independent parts of the Superior Courts for the administration of the act, and makes the clerks of the Superior Courts judges of the juvenile courts. *In re Hamilton*, 182 N. C. 44, 108 S. E. 385.

**Same—Assault with Deadly Weapon.**—The juvenile court has exclusive jurisdiction over investigating a charge of an assault with a deadly weapon, inflicting a serious injury, made by a child within sixteen years of age, and where a justice of the peace has assumed jurisdiction and

bound the defendant over to the Superior Court, the case will, on motion, be removed to the juvenile court, to be proceeded with as the statute directs, though at the later date the offender's age may be more than sixteen years. *State v. Coble*, 181 N. C. 554, 107 S. E. 132.

**Resume of Result.**—By this section and the following section of this article in case of children under the age of sixteen years charged with being delinquent by reason of the violation of the criminal laws of the state, it is provided and intended to be provided in effect: (a) that children under fourteen years of age are no longer indictable as criminals, but must be dealt with as wards of the state, to be cared for, controlled and disciplined with a view to their reformation. (b) That in case of children between fourteen and sixteen years of age, and as to felonies, whenever the punishment can not exceed ten years, they may if the instance requires it, be bound over to the Superior Court to be prosecuted under the criminal law appertaining to the charge. (c) That in case of children from fourteen to sixteen years of age as to felonies, whenever the punishment is ten years and over they are amenable to prosecution for crime as in case of adults. *State v. Burnett*, 179 N. C. 735, 102 S. E. 711.

### § 5041. Definitions of terms.

**The Word "Child."**—The provision of sec. 3, ch. 97, Public Laws 1919, that the meaning of the word "child" shall be one "less than eighteen years of age," and the term "adult" shall mean any person eighteen years old or over, intended, from the interpretation of the entire chapter, that to come within the provision of the act the child should be a minor under the age of sixteen years. The discrepancy is cured by this section. *State v. Coble*, 181 N. C. 554, 107 S. E. 132.

### § 5046. Service of summons.

**When Summons to Parents Unnecessary.**—Where the juvenile court has examined into the condition of a child and has adjudged that the child is of wandering or dissolute parents, and living with its poor and dependent grandparents, who had acquiesced in the investigation and its results, it is unnecessary to the valid adjudication fixing the child as a ward of the State and taking its custody accordingly, that the parents should have been notified to be present at the investigation, though such course is to be commended when the child is living with its parents or under their control, or is living at the time within the jurisdiction of the court. *In re Coston*, 187 N. C. 509, 122 S. E. 183.

### § 5054. Modification of judgment; return of child to parents.

See § 5058.

**Rights of Parents.**—Parents, guardians, etc., must be notified and given an opportunity to be heard in proceedings in the juvenile courts under this section, with the right to review in the Superior Court upon adverse judgment; and if the child is taken over by the state, they are allowed, on proper application at any time, to have their child brought before the court, its condition inquired into and further orders made concerning it except where committed to a state institution and then they may apply directly to the Superior Court, thus giving full consideration to the family relation and parental rights. *State v. Burnett*, 179 N. C. 735, 102 S. E. 711.

**Same—Child in State Institution.**—The exception in this section, that a case may not be investigated on the petition of the parent, etc., when the custody of the child is committed to an institution controlled by the state, applies to the action of the juvenile court, and does not limit the Superior Court in its general jurisdiction over matters of law and equity, in making, upon proper application and appropriate writs, inquiry and in-



vestigation into the status and condition of children disposed of under the statute, or in rendering such orders and decrees therein as the rights and justice of the case or the welfare of the child may require. *State v. Burnett*, 179 N. C. 735, 102 S. E. 711.

## § 5058. Appeals.

**Authority of Superior Court Judge.**—Where the proceedings for the custody of a child under sixteen years has been transferred to the juvenile court, and comes again to the Superior Court judge on appeal, the judge of the latter court has authority to review the findings of fact and the judgment of the former court, under the supervision and control given him by the statute, this section, and his findings upon competent evidence are conclusive on appeal to the Supreme Court. In *re Hamilton*, 182 N. C. 44, 108 S. E. 385.

Where the Superior Court judge has referred a proceeding brought by a husband in that court for the custody of his child, less than sixteen years of age, and the matter comes on appeal to the Superior Court again, the validity of the order sending or transferring the petition to the juvenile court for original investigation does not present a controlling question, or affect the jurisdiction of the Superior Court on the appeal, for thereon the judge thereof has ample authority to hear the case, either because it was properly instituted in the first instance or by virtue of the appeal. In *re Hamilton*, 182 N. C. 44, 108 S. E. 385.

**Application First Made to Juvenile Court.** — Where the parent of a child that has been adjudicated a ward of the State under the statute relating to juvenile courts afterwards claims the possession of the child, the procedure requires that she makes application to the juvenile court that had adjudicated the matter in order to avoid conflict and uncertainty as to status or condition of the child, to the end that an investigation be made of the circumstances in the course and practice of the courts. In *re Coston*, 187 N. C. 509, 122 S. E. 183.

**Writ of Habeas Corpus.**—The statutory remedy by appeal being provided from the determination of the juvenile court from its judgment that a certain child comes within the statutory provisions, and the status of the child has been ascertained by the juvenile court as being that of a ward of the State, the writ of habeas corpus is not available to the parent or other claiming the child, unless in rare and exceptional cases wherein the welfare of the child has not been properly provided for. In *re Coston*, 187 N. C. 509, 122 S. E. 183.

While *prima facie* the parent has the right to the custody of his child in preference to others, this right is not an absolute one and must yield when the best interest of the child requires it; and when the father has filed his petition in habeas corpus proceedings for the custody of his child in the possession of his deceased wife's parents, the award of the Superior Court Judge for the respondents upon findings, sustained by the evidence, that the father was an unsuitable person, and that the best interest of the child required that she should remain with her grandparents, will not be disturbed in the Superior Court on appeal. In *re Hamilton*, 182 N. C. 44, 108 S. E. 385.

## ART. 4. AID OF NEEDEY ORPHANS IN HOMES OF WORTHY MOTHERS

### § 5067 (h). Statements furnished to state board. Approval. Vouchers.

At the end of each fiscal quarter the treasurer of the county wherein aid has been granted shall furnish an itemized statement in each case of amounts paid, duly certified by him under oath, to the state

board of charities and public welfare. If each case thereon shall have been approved by the state board of charities and public welfare and all required regulations of this article shall have been fulfilled, the state board of charities and public welfare shall certify the account to the state treasurer, whereupon the state treasurer shall immediately make out and forward to such county treasurer his voucher for one-half of the total amount certified as having actually been paid out by the county. Such voucher shall be made out against any fund in the treasury not otherwise appropriated: *Provided*, the total amount for the state shall not exceed [the amount appropriated for this purpose] per year, to be apportioned among all the counties on a per capita basis: [*Provided*, that if the board of county commissioners of any county shall fail to enter into an agreement with the State on or before the first Monday of June, one thousand nine hundred and twenty-five, or on or before the first Monday in June of any succeeding year, that they will meet the State apportionment for mothers' aid in such county for the ensuing fiscal year, in accordance with the provisions of this act, then the amount apportioned to that county shall revert to the general mothers' aid fund and be available for apportionment to the counties complying with the provisions of this act, on the basis of the population of those counties.] (1923, c. 260, s. 8; 1925, c. 275, s. 6; 1925, c. 292.)

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## CHAPTER 91

### COMMERCE AND BUSINESS IN STATE

#### ART. 1. REGULATION AND INSPECTION

##### § 5098. Local: Sale of calves for veal.

It shall be unlawful for any person or persons, firm, or corporation to buy or sell, or engage in the business of buying and selling or shipping calves for veal under the age of six months, either dead or alive: *Provided*, that this act shall not apply to persons buying or selling heifer calves to be raised for milk cows, nor to bull calves for raising purposes or work stock.

Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall pay a penalty of not less than fifteen dollars nor more than thirty dollars, or be imprisoned for not less than twenty nor more than thirty days, or both, in the discretion of the court, for each and every offense.

This act shall apply to the following counties only: Alamance, Alexander, Ashe, Avery, Caldwell, Cherokee, Clay, Franklin, Gaston, Graham, Lee (1917, c. 93, s. 1), Madison, McDowell, Mitchell, Robeson, Sampson, Wake, and Wilson. (Ex. Sess. 1913, c. 80; 1915, c. 2 (Cabarrus, Guilford, Hoke, Rowan, Moore, Warren), c.



155 (Durham); P. L. 1919, c. 159 (Lincoln county); P. L. 1917, c. 470 (Cleveland county); 1917, c. 299 (Henderson county); Ex. Sess. 1924, c. 11 [Omits Burke].)

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## CHAPTER 92

### CONFEDERATE HOMES AND PENSIONS

#### ART. 1. SOLDIERS' HOME

##### § 5133. Uniform provided for inmates.

The board of directors of the soldiers' home are authorized and directed to purchase one suit or uniform of Confederate gray each year, if necessary, for the use and wear of each old soldier at said home; and when any old soldier shall leave the home or shall die, he may take said suit or uniform with him or may be buried in the same. (1909, Resolution, p. 1356; 1925, c. 275, s. 6.)

#### ART. 3. PENSIONS

##### § 5164. County tax for pensions.

**Constitutionality.**—Whether this section be regarded as general or special, it meets the requirements of Article V, section 6, and its efficacy is not impaired by this section of Constitution. It is a familiar principle that existing statutes not expressly or impliedly repealed by an amendment to the Constitution remain in full force and effect, and that a statute will not be declared void unless the breach of the Constitution is so manifest as to leave no room for reasonable doubt. *Brown v. Jennings*, 188 N. C. 155, 124 S. E. 150.

##### § 5168 (e). Examination and classification by county board. Certificate of disability.

All persons entitled to pensions under this article, not now drawing pensions, shall appear before the county board of pensions on or before the first Monday [s] in [February and] July of each year, for examination and classification in compliance with the provisions of this article: *Provided*, that all such as are unable to attend shall present a certificate from a creditable physician, living and practicing medicine in the community in which the applicant resides, that the applicant is unable to attend. (1921, c. 189, s. 5; 1924, c. 106.)

##### § 5168 (f). Annual revision of pension roll.

On the first Monday [s] of [February and] July of each year the pension board of each county shall revise and purge the pension roll of the county, first giving written notice of ten days to the pensioner who is alleged not to be rightfully on the state pension roll, to show cause why his name should not be stricken from the pension list, and the board shall meet another day to consider the subject of purging the list. (1921, c. 189, s. 6; 1924, c. 106.)

**§ 5168 (g). Blind or maimed Confederate soldiers.**

All ex-Confederate soldiers and sailors who have become totally blind since the war, or who have lost their sight or both hands or feet, or one arm and one leg, in the Confederate service, shall receive [three hundred] dollars a year. (Rev., s. 4991; 1901, c. 332, s. 5; 1899, c. 619; 1907, c. 60; 1921, c. 189, s. 7; 1924, c. 83; 1925, c. 275, s. 6.)

**§ 5168 (j). Classification of pensions for soldiers and widows.**

There shall be paid out of the treasury of the state, on the warrant of the auditor, to every person who has been for twelve months immediately preceding his application for pension a bona fide resident of the state, and who is incapacitated for manual labor, and was a soldier or a sailor in the service of the Confederate States of America, during the war between the states, and to the widow of any deceased officer, soldier or sailor who was in the service of the Confederate States of America during the war between the states, if such widow was married to such soldier or sailor before the first day of January, one thousand eight hundred and [ninety-eight], and if she has married again, is a widow at the date of her application, the following sums annually according to the degree of disability ascertained by the following grades:

1. To such as have received a wound which renders them totally incompetent to perform manual labor in the ordinary vocations of life, and to all blind Confederate widows who are on the pension roll, one hundred dollars (\$100.)

2. To such as have lost a leg above the knee or an arm above the elbow, ninety dollars (\$90.)

3. To such as have lost a foot or a leg below the knee, or a hand or an arm below the elbow, or have a leg or an arm utterly useless by reason of a wound or permanent injury, seventy dollars (\$70.)

4. To such as have lost an eye, and to the widows and all other soldiers who are now disabled from any cause to perform manual labor, sixty dollars (\$60). (1921, c. 189, s. 9; Ex. Sess. 1921, c. 89; 1924, c. 111.)

**§ 5168 (bb). Taking fees for acknowledgments by pensioners.**

From and after the ratification of this act it shall be unlawful for any clerk of the Superior Court, notary public or any magistrate to charge any Confederate pensioners or the widow of such Confederate pensioner receiving a pension from the State of North Carolina for taking acknowledgments in connection with pension papers.

Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1925, ch. 68.)



## CHAPTER 92A

**CONTRACTORS****§ 5168 (cc). Contractor defined.**

For the purpose of this chapter a general contractor is defined to be one who for a fixed price or fee undertakes to construct buildings, highways or other structures in accordance with plans and specifications prepared by a licensed architect or registered engineer, where the cost of the completed structure is in excess of ten thousand dollars (\$10,000). (1925, c. 318, s. 1.)

**§ 5168 (dd). Licensing board; organization.**

There shall be a State licensing board for contractors consisting of five members who shall be appointed by the Governor within sixty days after this chapter becomes effective. At least one member of such board shall have as a larger part of his business the construction of highways; at least one member of such board shall have as the larger part of his business the construction of public utilities; at least one member shall have as the larger part of his business the construction of buildings. The members of the first board shall be appointed for one, two, three, four and five years respectively, their terms of office expiring on the thirty-first day of December of the said years. Thereafter in each year the Governor in like manner shall appoint to fill the vacancy caused by the expiration of the term of office a member for a term of five years. Each member shall hold over after the expiration of his term until his successor shall be duly appointed and qualified. If vacancies shall occur in the board for any cause the same shall be filled by the appointment of the Governor. The Governor may remove any member of the board for misconduct, incompetency or neglect of duty. (1925, c. 318, s. 2.)

**§ 5168 (ee). Members of board to take oath.**

Each member of the board shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said board and to uphold the Constitution of North Carolina and the Constitution of the United States. (1925, c. 318, s. 3.)

**§ 5168 (ff). First meeting of board; officers; secretary-treasurer to give bond.**

The said board shall, within thirty days after its appointment by the Governor, meet in the city of Raleigh, at a time and place to be designated by the Governor, and organize by electing a chairman, a vice chairman, and a secretary-treasurer, each to serve for one year. Said board shall have power to make such by-laws, rules and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The secretary-treasurer shall

give bond in such sum as the board shall determine, with such security as shall be approved by the board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. (1925, c. 318, s. 4.)

**§ 5168 (gg). Seal of board.**

The board shall adopt a seal for its own use. The seal shall have the words "Licensing Board for Contractors, State of North Carolina," and the secretary shall have charge, care and custody thereof. (1925, c. 318, s. 5.)

**§ 5168 (hh). Meetings; notice; quorum.**

The board shall meet twice each year, once in April and once in October, for the purpose of transacting such business as may properly come before it. At the April meeting in each year the board shall elect officers. Special meetings may be held at such times as the board may provide in the by-laws it shall adopt. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the by-laws may provide. Three members of the board shall constitute a quorum. (1925, c. 318, s. 6.)

**§ 5168 (ii). Records of board; disposition of funds.**

The secretary-treasurer shall keep a record of the proceedings of the said board and shall receive and account for all moneys derived from the operation of this chapter. Any funds remaining in the hands of the secretary-treasurer to the credit of the board after the expenses of the board for the current year have been paid shall be paid over, share and share alike, to the University of North Carolina and to the North Carolina State College of Agriculture and Engineering for the use of their engineering departments. The board has the right, however, to retain at least ten per cent of the total expense it incurs for a year's operation to meet any emergency that may arise. (1925, c. 318, s. 7.)

**§ 5168 (jj). Records; roster of licensed contractors.**

The secretary-treasurer shall keep a record of the proceedings of the board and a register of all applicants for license showing for each the date of application, name, qualifications, place of business, place of residence, and whether license was granted or refused. The books and register of this board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the secretary of the board during the month of January of each year; such roster shall be printed by the board out of funds of said board as provided in section seven, and a copy mailed to and placed on file by the clerk of each incorporated city, town and county in the State. On or before the first day of March of each



year the board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of the receipts and expenditures of the board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of licensed general contractors. (1925, c. 318, s. 8.)

**§ 5168 (kk). Application for license; examination; certificate; renewal.**

Any one hereafter desiring to be licensed as a general contractor in this State shall make a written application for examination to said board on such form as is prescribed by the board, which application shall be accompanied by twenty dollars (\$20). If said application is satisfactory to the board, then the applicant shall be entitled to an examination to determine his qualifications. If the result of the examination of any applicant shall be satisfactory to the board, then the board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina. Any one failing to pass such examination may be reexamined at any regular meeting of the board without additional fee. Certificate of license shall expire on the last day of December following their issuance or renewal and shall become invalid on that date unless renewed. Renewal may be effective any time during the month of January by the payment of a fee of ten dollars (\$10) to the secretary of the board. (1925, c. 318, s. 9.)

**§ 5168 (ll). Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; notice of charges; reissuance of certificate.**

The board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license, or gross negligence, incompetency or misconduct in the practice of his profession. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the board. Such charges, unless dismissed without hearing by the board as unfounded or trivial, shall be heard and determined by the board within three months after the date in which they were preferred. A time and place for such hearing shall be fixed by the board and held in the county in which said charges originated. A copy of the charges, together with the notice of the time and place of hearing, shall be legally served on the accused at least thirty days before the fixed date for the hearing, and in the event that such service cannot be effected thirty days before such hearing, then the date of hearing and determination shall be postponed as may be necessary to permit the carrying out of this condition. At said hearing the accused shall have the right to appear personally and by counsel and to cross-examine witnesses against

him, her or them, and to produce evidence of witnesses in his, her or their defense. If after said hearing the board unanimously votes in favor of finding the accused guilty of any fraud or deceit in obtaining license, or of gross negligence, incompetency or misconduct in practice the board shall revoke the license of the accused.

The board may reissue a license to any person, firm or corporation whose license has been revoked: *Provided*, three or more members of the board vote in favor of such reissuance for reasons the board may deem sufficient.

The board shall immediately notify the Secretary of State and the clerk of each incorporated city, town or county in the State of its finding in the case of the revocation of a license or of the reissuance of a revoked license.

A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the board. (1925, c. 318, s. 10.)

### **§ 5168 (mm). Certificate evidence of license.**

The issuance of a certificate of license by this board shall be evidence that the person, firm or corporation named therein is entitled to all the rights and privileges of a licensed general contractor while the said license remains unrevoked or unexpired. (1925, c. 318, s. 11.)

### **§ 5168 (nn). Impersonating contractor; false certificate; giving false evidence to board; penalties.**

Any person, firm or corporation who after this chapter has been in effect twelve months is not legally authorized to practice general contracting in this State, except as provided for in this act, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars or imprisonment of three months, or both fine and imprisonment in the discretion of the court. (1925, c. 318, s. 12.)

### **§ 5168 (oo). Exemptions from chapter.**

The following shall be exempt from the provisions of this chapter: The practice of general contracting as defined in section 5168(cc) by an authorized representative or representatives of the United States government, State of North Carolina, incorporated town, city or county of this State: *Provided, however*, that such operation shall be under the supervision of a licensed architect or a registered engineer: *Provided further*, that any person, firm or corporation who was engaged in the business of general contracting



in the State of North Carolina prior to March first, one thousand nine hundred and twenty-five, shall be entitled to the license provided for in this chapter upon the payment of the fees herein prescribed, without submitting to examination. (1925, c. 318, s. 13.)

**§ 5168 (pp). Copy of chapter included in specifications; bid not considered unless contractor licensed.**

All architects and engineers preparing plans and specifications for work to be contracted in the State of North Carolina shall include in their invitations to bidders and in their specifications a copy of this chapter or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or nonresident of this State and whether a license has been issued to him or not, the information that it will be necessary for him to show evidence of a license before his bid is considered. (1925, c. 318, s. 14.)

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## CHAPTER 93

### CO-OPERATIVE ORGANIZATIONS

#### Subchapter II. Land and Loan Associations

##### ART. 6 (A). LAND MORTGAGE ASSOCIATIONS

**§ 5207 (a). Land conservation and development bureau.**

Recognizing that agriculture is the most fundamental wealth-producing occupation of the State and that land is the basis of agriculture, the General Assembly of North Carolina does hereby authorize and direct the State Department of Agriculture to establish as a major division of its organization a land conservation and land development bureau. The function of this bureau shall be to promote conservation, rural home ownership, and the development of the land resources of the State through land mortgage associations under the following provisions. (1925, c. 223, s. 1.)

**§ 5207 (b). Number of incorporators; capital stock.**

Any number of persons, resident free-holders of the State, not less than fifteen, may associate to establish an association on the terms and conditions and subject to the liabilities hereinafter prescribed. The aggregate amount of the capital stock of any such association shall not be less than twenty thousand dollars (\$20,000). Such association shall mean a corporation organized under the laws of the State for the purpose of making loans upon agricultural lands, forest lands and dwelling houses within this State and known as land mortgage associations. (1925, c. 223, s. 2.)

**§ 5207 (c). Incorporation.**

The articles of incorporation shall be in writing signed and acknowledged by the incorporators and shall contain the following:

- (1) The declaration that they are associating for the purpose of

forming a land mortgage association under the provisions of this article.

(2) That the name of such association, which shall be in no material respect similar to any other association in the same county.

(3) The name of the village, town or city, and the county where such association is to be located.

(4) The amount of capital stock, which shall be divided into shares of one hundred dollars each.

(5) The period for which such association is organized. (1925, c. 223, s. 3.)

### **§ 5207 (d). Organization.**

The incorporators at their first annual meeting shall elect by ballot from their number a board of trustees of not less than six members who shall adopt a code of by-laws and a plan of organization approved by the Commissioner of Agriculture and the Corporation Commission. (1925, c. 223, s. 4.)

### **§ 5207 (e). Corporate powers.**

Said land mortgage association shall have power: (a) To make loans, the conditions of which shall be approved by the Corporation Commission if the security taken therefor is to be used as the basis for a bond issue under subsection (c) hereof, and to accept as security for any such loan a first mortgage upon improved or partially improved agricultural lands within this State. Such loan shall not exceed, however, sixty-five per cent of the value of such real estate so conveyed, according to the appraisal made as herein provided.

(b) To purchase first mortgages, heretofore or hereafter issued against North Carolina agricultural lands, either improved or partially improved, from persons or firms resident of this State or corporations organized under the laws of this State engaged in the colonization or settlement of North Carolina lands and to whom such mortgages were issued, if, after investigation, the plan of settlement or colonization followed by such person, firm or corporation is approved by the Commissioner of Agriculture as beneficial to the settler or colonist, and if the lands against which such mortgages are issued are found by the said commissioner to be in fact agricultural lands suitable for agricultural purposes and the terms and conditions of the loans made by such person, firm or corporation are just and reasonable, or from banks or trust companies organized under the laws of this State, or of the United States, to do business in this State, to which such mortgages were issued direct by the borrowers. Each such mortgage shall be payable on the amortization plan maturing in not less than twenty years. The request for an investigation leading to such a purchase of mortgages from persons, firms or corporations engaged in the settlement or colonization of North Carolina lands shall be accompanied by a deposit, the amount of such deposit to be determined by the Commissioner of Agriculture. Upon



completion of the investigation the Commissioner of Agriculture shall render a statement of expense accompanied by a remittance of any unused balance of such deposit, but no mortgage shall be purchased until the lands against which the same is issued have been appraised as hereinafter provided for the appraisal of land for a loan by the land mortgage association and such mortgage is approved by all members of the loan committee.

(c) To issue bonds secured by the pledge of the mortgage so taken or purchased.

(d) To pledge the notes and mortgages so taken or purchased under the provisions of subdivisions (a) and (b) hereof as security for the bonds of the land mortgage association referred to in subdivision (c) hereof. (1925, c. 223, s. 5.)

### **§ 5207 (f). Restrictions.**

All mortgage obligations acquired by the company shall be subject to the following restrictions:

(a) Each such mortgage shall be a first and valid lien upon improved or partially improved agricultural lands within the State of North Carolina;

(b) Each such mortgage shall be a first and valid lien upon the whole and undivided fee and upon no lesser estate;

(c) Each such mortgage shall be given to secure a principal indebtedness not exceeding in amount fifteen per cent of the capital and surplus of the company;

(d) All such mortgages shall contain provisions for soil conservation;

(e) All such mortgages shall contain provisions for the time of commencing payments for annual or semiannual reduction of the indebtedness secured thereby, subject to the requirements as to repayment of loans and interest hereinafter provided;

(f) The company shall make no loan secured by mortgage of any real estate in which any officer or trustee of the company is interested either directly or indirectly, except upon the approval of two-thirds of all the trustees;

(g) A sufficient amount of the proceeds of any loan made upon lands upon which are buildings in course of construction or upon which land clearing or other improvements are being made shall be retained by the association and paid out only upon construction or improvement vouchers, countersigned by duly authorized agent of the association. (1925, c. 223, s. 6.)

### **§ 5207 (g). Mortgage forms; approval.**

The mortgages to be given to the association, the bonds to be issued and the trust deed executed to secure the bonds shall be in such form and shall contain such conditions as will adequately protect all parties thereto. The trustees shall provide the forms subject to

the joint approval of the Corporation Commission and the Attorney-General. (1925, c. 223, s. 7.)

### **§ 5207 (h). Repayment of loan and interest.**

The prospective borrower may be required to pay all expenses incidental to the examination of title and appraisal of the property. The total amount shall include (a) the rate of interest agreed upon; and (b) a payment. (1925, c. 223, s. 8.)

### **§ 5207 (i). Terms of payment.**

A borrower may repay his loan by installments of such frequency and amounts as may be agreed upon: *Provided*, that not less than one per cent of the original amount of the mortgage shall be paid upon the principal thereof annually, commencing not later than the sixth year succeeding the year in which the loan was made the borrower may pay a larger installment upon the principal, or the whole of it, at any interest date, such payments to be in amounts equal to additions of one or more principal amortization payments. Such payment may be made in cash, or by tendering at par bonds of the associations. For failure to pay the interest or any installment required by the terms of the loan, the borrower may be fined as the by-laws may prescribe. But the borrower shall never be required to pay more than the specified installment, nor to pay the principal before it is due except as prescribed herein for partial repayment on account of depreciation and for foreclosure by the association. The borrower may on sixty days notice repay the association his total indebtedness, or, without such notice, upon payment of sixty days interest upon the principal unpaid. The borrower shall be entitled to a receipt for all installments as paid, and where the repayment is complete to a satisfaction of his note and mortgage. (1925, c. 223, s. 9.)

### **§ 5207 (j). Transfer of mortgaged lands.**

The acquirer of any lands mortgaged to a land mortgage association shall enter at once, on the acquisition of the land, into a written agreement with the association, attested by a notary, or a justice, and assume the personal responsibility for the indebtedness to the association attaching to such lands. This document must be presented to the trustees within fourteen days after demand. (1925, c. 223, s. 10.)

### **§ 5207 (k). Calling in loans before due.**

Every land mortgage association shall have the power to call in loans upon sixty days notice:

(a) When the person acquiring the lands upon which money has been loaned does not comply with the provisions of the previous section and fulfill the obligations incumbent upon him;

(b) When the debtor does not meet the obligation imposed upon him by his contract and the by-laws of the land mortgage association;



(c) When the mortgaged premises become subject to forced sale;

(d) When the mortgaged premises are depreciating in value because of lack of care, of failure to maintain and conserve or from other cause.

The trustees of the association, whenever necessary, shall provide for an inspection of mortgaged premises by the State Department of Agriculture for an investigation of the care which is being given said premises, and may employ an expert to inspect the soil with a view of determining whether or not the same is being depleted. (1925, c. 223, s. 1.)

#### **§ 5207 (1). Partial recall of debt.**

The association may require a suitable partial repayment of the debt if the mortgaged premises may have at any time become depreciated in value from any cause whatsoever. (1925, c. 223, s. 12.)

#### **§ 5207 (m). Foreclosure.**

Whenever any loan is called in and the borrower shall fail to pay the principal and interest due to the association as required by law and the notices given him, the land mortgage association may then foreclose upon the mortgaged premises as for a past due loan. But in no case shall a borrower be liable for a sum greater than the amount of the unpaid portion of the loan with any accretions of interest thereon and expenses incidental to the collection thereof. (1925, c. 223, s. 13.)

#### **§ 5207 (n). Appraisal of lands.**

Upon application for a loan the land mortgage association shall cause the lands which it is proposed to mortgage to the association to be appraised by a competent appraiser furnished them by the State Department of Agriculture. (1925, c. 223, s. 14.)

#### **§ 5207 (o). Preference prohibited; association borrowing money.**

No land mortgage association, and no officer or agent thereof, shall give any preference to any creditor by pleading any of the assets of such association as collateral security, except that any such association may borrow money for temporary purposes, and may pledge assets of the association as collateral security therefor. Whenever it shall appear that any land mortgage association has borrowed habitually for the purpose of reloaning, the Corporation Commission may require such association to pay off such amount so borrowed. (1925, c. 223, s. 15.)

#### **§ 5207 (p). Bond issues.**

(a) The bonds to be issued by any land mortgage association may be issued for such amounts, bearing such serial number, and date or dates, and be payable at such time and times, bear such rate of interest, and be redeemable at maturity or upon notice at such times

and in such manner, as the land mortgage association may, subject to the approval of the banking commission, deem advisable.

(b) Each land mortgage association shall keep a register for the registration and transfer of bonds issued by it in which it shall register, or cause to be registered, all bonds upon presentation thereof for such purpose; and such register shall contain the postoffice address of all registered holders of bonds and shall, at all reasonable times, be open to the inspection of the banking commission, or any of its deputies, and to the State Treasurer. (1925, c. 223, s. 16.)

### **§ 5207 (q). Deed of trust.**

(a) To secure the payment of such bonds, the land mortgage association shall issue a collateral deed of trust to the State Treasurer, pledging as security for such bonds the notes and mortgages taken or purchased, as provided herein, in an amount equal to or exceeding the aggregate amount of bonds issued or to be issued.

(b) The total amount of bonds outstanding shall not at any time exceed the total amount unpaid upon the notes secured by the mortgages belonging to the association and pledged for the payment of the bonds, plus such securities and moneys as may be on deposit with the State Treasurer under the provisions hereof.

(c) The aggregate amount of the principal of all bonds issued by land mortgage associations and outstanding at any one time shall not exceed twenty times the amount of the capital and surplus of the company. (1925, c. 223, s. 17.)

### **§ 5207 (r). Collaterals deposited with State Treasurer.**

All mortgages pledged to secure the payment of the bonds issued hereunder shall be deposited and left with the State Treasurer. The land mortgage association may, with the approval of the State Treasurer, remove such mortgages from the custody of the State Treasurer, substituting in place thereof other of its mortgages, or money or State of North Carolina bonds or certificates of deposit, endorsed in blank, issued by State or National banks located in North Carolina, farm mortgage bonds issued under the provisions of the Federal Farm Loan Act approved July seventeenth, one thousand nine hundred and sixteen, or obligations of the United State Government, in an amount equal to or greater than the amount unpaid upon the notes secured by the mortgages withdrawn. (1925, c. 223, s. 18.)

### **§ 5207 (s). Redemption of bonds.**

(a) Notice of redemption of bonds may on no account be given on the part of the holder thereof, but may be given by the association only for the purpose of affecting redemption in accordance with the conditions of the bonds and as provided by law and the by-laws.

(b) If the land mortgage association shall elect to redeem any bond prior to maturity, six months notice of redemption shall be given and shall be effected by personal service upon the owner and



holder of the bond, by notice mailed to his address as registered or by advertising the same three times in a newspaper selected by the State Treasurer.

(c) The numbers of the bonds of which notice of redemption is to be given shall be determined by lot, to be drawn by the president or the vice president at a meeting of the trustees. (1925, c. 223, s. 19.)

#### **§ 5207 (t). Validity of bonds after maturity.**

In case the holder of any bond outstanding shall not have presented the same for payment within the period of two years after its maturity or within two years after the date fixed for the redemption, as the case may be, then such bonds shall cease to be a lien upon the mortgages, moneys, and securities pledged to the State Treasurer and deposited with him as security therefor, but such bond shall still constitute, until the statute of limitation running against such bonds shall have expired, a single legal money claim or demand against the land mortgage association issuing the same, and be recoverable from it in a suit at law, and in no event shall any interest be collectible upon such bond after the maturity thereof or after the date fixed for its redemption. (1925, c. 223, s. 20.)

#### **§ 5207 (n). Bonds as payment.**

If the association gives notice to a debtor for repayment of the mortgage loan the latter must pay to the association in cash or in its bonds at par the face of the same so far as it has not yet been covered by his assets in the amortization and payments. (1925, c. 223, s. 21.)

#### **§ 5207 (v). Bonds as investments; taxation.**

The bonds of a land mortgage association shall be a legal investment for savings associations, trust companies, or other financial institutions chartered under the laws of this State and shall also be a legal investment for trustees, executors, administrators, or custodians of public or private funds, or corporations, partnerships or associations. (1925, c. 223, s. 22.)

#### **§ 5207 (w). Applications of earnings; reserve fund.**

The gross earnings of the association shall be ascertained annually, and there shall first be deducted therefrom the expenses incurred by the association for the preceding year and the balance thereof shall be set aside as a reserve fund for the payment of contingent losses, to an amount equal to two per cent of the capital stock outstanding, and until such reserve fund equals twenty per cent of the capital stock of such association. (1925, c. 223, s. 23.)

#### **§ 5207 (x). Restriction on holding real estate.**

No land mortgage association shall acquire real estate (other than for the occupation of its offices) except to protect its interests in

case any of the mortgages owned by it are foreclosed and the property therein described sold to pay the indebtedness secured thereby. All real estate so acquired shall be promptly sold. (1925, c. 223, s. 24.)

### **§ 5207 (y). Banking laws applicable.**

The statutes relating to banks and banking in this State, that is, sections two hundred and sixteen to two hundred and fifty-four, inclusive, of the Consolidated Revised Statutes of one thousand nine hundred and nineteen, with all amendments thereto, as passed at the one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-three and one thousand nine hundred and twenty-five sessions of the General Assembly, in so far as applicable and not in conflict with the provisions hereof shall apply to land mortgage associations. (1925, c. 223, s. 25.)

## **Subchapter III. Savings and Loan Associations**

### **ART. 7. SUPERINTENDENT OF SAVINGS AND LOAN ASSOCIATIONS**

#### **§ 5208. Office created.**

There shall be established in the State Department of Agriculture a superintendent of savings and loan associations and such assistants as may be necessary, at salaries to be fixed by the State Board of Agriculture. (1915, c. 115, s. 1; 1925, c. 73, s. 4.)

#### **§ 5209. Duties of the officer.**

The duties of the superintendent of [savings and loan associations] shall be as follows:

1. To organize and conduct, in the [state department of agriculture], a bureau of information in regard to coöperative associations and rural [and industrial credits].

2. Upon the application of three persons residing in the state of North Carolina, to furnish, without cost, such printed information and blank forms as, in his discretion, may be necessary for the formation and establishment of any local [savings and loan association] in the state.

3. To maintain an educational campaign in the state looking to the promotion and organization of [savings and loan associations]; and upon the written request of twelve bona fide residents of any particular locality in this state expressing a desire to form local [savings and loan association] at such locality, the superintendent or one of his assistants shall proceed as promptly as convenient to such locality and advise and assist such organizers to establish the institution in question.

4. To examine at least once a year, and oftener if such examination be deemed necessary by the superintendent or his assistant, [savings and loan associations] formed under this subchapter. A report



of such examination shall be filed with the [state department of agriculture], a copy mailed to the [savings and loan association] at its proper address. (1915, c. 115, s. 1; 1925, c. 73, ss. 2, 3, 5, 6.)

ART. 8. INCORPORATION OF SAVINGS AND LOAN ASSOCIATIONS.

**§ 5209 (a). Change of name of credit unions.**

That all credit unions now chartered shall operate under this act and the changing of name of such corporations to savings and loan associations shall be optional. (1925, c. 73, § 18.)

**§ 5209 (b). Central association.**

That upon application of seven or more savings and loan associations for a central corporation for the purpose of securing credit and discounting notes with any outside agency, and to act as a clearing house in the settlement of these accounts, the superintendent of savings and loan associations shall, upon receipt and investigation of charters and by-laws signed by the secretary-treasurers of the several savings and loan associations, approve same if he is satisfied they are in conformity with and give reasonable assurance that the affairs of the corporation will be administered in accordance with this act.

(2) The procedure and plan of organization, method of operation, officers and their duties, supervision, liquidation and dissolution shall be the same as with any local savings and loan association; except that the membership of a central savings and loan association shall be institutional and only local savings and loan associations can become members, unless the by-laws otherwise prescribe.

(3) Any local savings and loan association can become a member of a central association by subscribing to any number of shares and paying for same, in whole or in part, not to be in excess of twenty-five per cent (25%) of their share capital and reserve fund.

(4) Deposits in the central association may be accepted from any source in such amounts and upon such terms as the board of directors may determine and the by-laws shall prescribe.

(5) The secretary-treasurer shall cast the one vote of local member savings and loan associations in its annual election of officers and at all meetings of the member associations, unless the by-laws otherwise prescribe.

(6) A central savings and loan association shall not charge more than three fourths ( $\frac{3}{4}$ ) of one per cent for discounting paper, provided that no discount rate shall make the interest higher than the legal rate.

(7) Section fifty-two eighteen (5218), article nine (9), subchapter three (3) of the Consolidated Statutes, shall not apply to a central association, and such an association shall have power to borrow money from any source in amounts not in excess of ten times the amount of its capital and reserve fund.

(8) A central savings and loan association shall not be taxable

under any law which shall exempt any local savings and loan association. (1925, c. 73, s. 17.)

### § 5210. Applications filed.

Seven or more persons employed or residing in the state may become a [savings and loan association] by making, signing, and acknowledging a certificate which shall contain:

1. The name of the proposed [savings and loan association] which shall include the words, ["Savings and Loan Associations."]

2. A statement that incorporation is desired under this article.

3. The conditions, whether of residence, of occupation, or otherwise, which shall qualify persons for membership.

4. The par value of the shares, which shall not exceed twenty-five dollars.

5. The city, village, or town in which its principal business office is to be located. If it is to be located in an incorporated city, the street address of the city shall be given. If the condition of its membership is employment by a certain individual, copartnership, or corporation, a statement that its office shall be with such individual, copartnership, or corporation may be substituted for the street address.

6. The number of its directors, not less than five, all of whom must be members of and shareholders in the corporation.

7. The names and postoffice addresses of directors for the first year.

8. The names and postoffice addresses of the subscribers to the certificate, and a statement of the number of shares of stock which each agrees to take in the corporation. (1915, c. 115, s. 2; 1925, c. 73, s. 3.)

### § 5212. Certificate of incorporation.

The by-laws acknowledged to have been adopted by all of the incorporators, together with the certificate of incorporation, shall be filed in the office of the superintendent of [savings and loan associations] who shall approve the certificate of incorporation if he is satisfied that it is in conformity with this subchapter, and shall approve the by-laws if he is satisfied as to the character of the incorporators and that the by-laws are reasonable and will tend to give assurance that the affairs of the prospective [savings and loan associations] will be administered in accordance with this subchapter. Thereupon, the superintendent of [savings and loan associations] shall issue to the corporation a certificate of approval, annexed to a duplicate of the certificate of incorporation and of the by-laws, which certificate of approval, together with the attached duplicate certificate of incorporation and duplicate by-laws, shall be filed in the office of the clerk of the superior court of the county in which the office of such [savings and loan associations] is situated, and upon such filing the incorpora-



tors shall become and be a corporation. The county clerk shall charge the same filing fee for filing the certificate of approval, certificate of incorporation and by-laws as he is now allowed to charge for filing a certificate of incorporation of a corporation organized under the business corporations law of the state. (1915, c. 115, s. 2; 1925, c. 73, s. 3.)

### **§ 5213. Amendment of by-laws.**

The by-laws adopted by the incorporators and approved by the superintendent of [savings and loan associations] shall be the by-laws of the corporation, and no amendment to the by-laws shall become operative until such amendment shall have been approved by the superintendent of [savings and loan associations], and a copy thereof certified by him, with a certificate of his approval, shall be filed in the office of the clerk of the superior court of the county where the office of the [savings and loan associations] is located. Such approval may be given or withheld by the superintendent of [savings and loan associations] at his discretion. The county clerk shall receive the same fee for filing as provided in the preceding section. (1915, c. 115, s. 3; 1925, c. 73, s. 3.)

### **§ 5214. Restriction of use of terms.**

The use by any person, copartnership, association, or corporation except corporations formed under the provisions of this subchapter, of any name or title which contains the words ["savings and loan association"] shall be a misdemeanor. (1915, c. 115, s. 4; 1925, c. 73, s. 3.)

### **§ 5215. Change of place of business.**

A [savings and loan association] may change its place of business on the written approval of the superintendent of [savings and loan associations], which written approval shall be filed in the office of the superintendent of [savings and loan associations] and a duplicate of the approval in the office of the clerk of the superior court of the county where its office was located, and a second duplicate in the office of the clerk of the superior court of the county in which the new office is to be located. Such approval of the superintendent may be given or withheld at his discretion. (1915, c. 115, s. 25; 1925, c. 73, s. 3.)

## **ART. 9. POWERS OF SAVINGS AND LOAN ASSOCIATIONS.**

### **§ 5216. General nature of business.**

A [savings and loan association] may receive the savings of its members in payment for shares or on deposit; may loan to its members at reasonable rates of interest not exceeding the legal rate, or may invest as hereinafter provided the funds so accumulated, and may undertake such other activities relating to the purpose of the corporation as its by-laws may authorize. (1915, c. 115, s. 5; 1925, c. 73, s. 3.)

**§ 5217. Receive deposits.**

A [savings and loan associations] may receive on deposit the savings of its members and also nonmembers in such amounts and upon such terms as the board of directors may determine and the by-laws shall provide. (1915, c. 115, s. 16; 1925, c. 73, s. 3.)

**§ 5218. Borrowing money.**

If the by-laws so provide, a savings and loan association shall have power to borrow money from any source in addition to receiving deposits, but the aggregate amount of such indebtedness shall not at any one time exceed more than four (4) times the sum of its capital, surplus and reserve fund. (1915, c. 115, s. 17; 1925, c. 73, s. 10.)

**§ 5218 (a). Authority to execute contracts of guaranty in certain cases.**

Local savings and loan associations may execute such contracts of guaranty as may be necessary to procure credit for its members: *Provided*, that the said contracts of guaranty shall not place on the said local savings and loan association a liability arising in any one year in excess of ten (10) per cent of the total credit under the said contracts of guaranty handled through that association in a particular year; and *provided further*, that all such contracts shall be approved by the superintendent of savings and loan associations and each such contract must bear his approval in writing before becoming effective. In assuming such liability the said savings and loan association may require of the individual members being served such security as the board of directors of each such savings and loan association may determine upon. (1925, c. 73, s. 11.)

**§ 5219. Investment of funds.**

The capital, deposits, undivided profits and reserve fund of the corporation may be invested in one of the following ways, and in such way only:

1. They may be lent to the members of the corporation in accordance with the provisions of this subchapter.

2. They may be deposited to the credit of the corporation in savings banks, [savings and loan associations, building and loan associations], state banks or trust companies, incorporated under the laws of the state, or in National banks located therein. Funds of [savings and loan associations] deposited in a savings bank, state bank, or trust company which may become insolvent, shall be preferred in the same way that funds of a "savings and loan association" so deposited are preferred under the banking law of the state.

3. ["A savings and loan association shall keep on deposit at interest in banks incorporated under the laws of the State of North Carolina and national banks therein so much of the reserve fund and capital stock as shall equal five (5) per cent of the total liabilities."]

4. Not more than ten per cent of the capital stock and reserve fund



of a [savings and loan association] may be invested in the stock of another [local savings and loan association] [and not more than twenty-five (25) per cent of the capital stock and reserve fund of a local association may be invested in the stock of a central association.] (1915, c. 115, s. 18; 1917, c. 232, ss. 2, 3; 1925, 73, ss. 12, 13, 14.)

### § 5220. Loans.

1. *To members.* A [savings and loan association] may lend to its members for such purposes and upon such security and terms as the by-laws shall provide and the credit committee shall approve; but security must be taken for any loan in excess of fifty dollars. An indorsed note shall be deemed to be security within the meaning of this section.

2. *Installment loans.* A member who needs funds with which to purchase necessary supplies for growing crops may receive a loan in fixed monthly installments instead of in one sum.

3. *Loans to members of committee.* The supervisory committee shall appoint a substitute to act on the credit committee in the place of any member in case such member makes application to borrow money from the [savings and loan association] or becomes surety for any other member whose application for a loan is under consideration.

4. *Loans to persons not members forbidden.* All officers and members of any committees in any way knowingly permitting or participating in making a loan of funds of a [savings and loan association] to one not a member thereof shall be guilty of a misdemeanor. The [savings and loan association] shall have the right to recover the amount of such illegal loans from the borrower or from any officers or members of committees who knowingly permitted or participated in the making thereof, or from all of them jointly.

5. *Repayment of loans.* A borrower may repay the whole or any part of his loan on any day on which the office of the corporation is open for the transaction of business. (1915, c. 115, s. 19; 1917, c. 232, s. 4; 1925, c. 73, s. 3.)

### § 5221. Rate of interest; penalty.

No corporation organized pursuant to this subchapter shall directly or indirectly charge or receive any interest, discount, or consideration, other than the entrance fee, greater than the legal rate.

Any corporation, any person, the several officers of any corporation, and the members of committees who shall violate the foregoing prohibition shall be guilty of a misdemeanor. The corporation shall also be subject to procedure by the superintendent of [savings and loan associations] as prescribed herein in article twelve. (1915, c. 115, s. 20; 1925, c. 73, s. 3.)

### § 5223. Dividends.

At the close of the fiscal year a [savings and loan association] may declare a dividend not to exceed six per cent per annum from the

income during the year and which remains after the deduction of expenses, losses, interest on deposits, and the amount required to be set apart to the reserve fund. Dividends shall be paid on all fully paid shares outstanding at the close of the fiscal year, but shares which become fully paid during the year shall be entitled to a proportional part of such dividend calculated from the first day of the month following such payment in full. (1915, c. 115, s. 22; 1923, c. 73, s. 3.)

#### **§ 5224. Voluntary dissolution.**

At any meeting specially called to consider the subject, [three-fourths of the members present and represented] may vote to dissolve the corporation and upon such vote shall signify their consent to such dissolution in writing. Such corporation shall then file in the office of the superintendent of [savings and loan associations] such consent, attested by its secretary or treasurer and its president or vice-president, with a statement of the names and residences of the existing board of directors of the corporation and the names and residences of its officers duly verified. The superintendent of [savings and loans associations], upon receipt of satisfactory proof of the solvency of the corporation, shall issue to such corporation, in duplicate, a certificate to the effect that such consent and statement have been filed and that it appears therefrom that such corporation has complied with this section. Such duplicate certificate shall be filed by the corporation in the office of the clerk of the superior court of the county in which the corporation has its place of business, and thereupon such corporation shall be dissolved and shall cease to carry on business except for the purpose of adjusting and winding up its affairs. The corporation, by its board of directors, shall then proceed to adjust and wind up its business and affairs, with power to carry out its contracts, collect its accounts receivable, and to liquidate its assets and apply the same in discharge of debts and obligations of such corporation, and after paying and adequately providing for the payment of such debts and obligations each share, according to the amount paid thereon, shall be entitled to its proportion of the balance of the assets. The corporation shall continue in existence for the purpose of paying, satisfying, and discharging any existing debts or obligations, collecting and distributing its assets, and doing all other acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts and obligations until its business and affairs are fully adjusted and wound up. (1915, c. 115, s. 24; 1925, c. 73, ss. 3, 15.)

#### **§ 5225. Savings institution; restriction of taxation.**

The corporation shall be deemed an institution for savings, and together with all accumulations therein shall not be taxable under any law which shall exempt [buildings and loan associations] or institutions for savings from taxation; nor shall any law passed taxing corporations in any form, or the shares thereof, or the accumulations



therein, be deemed to include corporations doing business in pursuance of the provisions of this sub-chapter, unless they are specifically named in such law. The shares of [savings and loan associations], being hereby regarded as a system for saving, shall not be subject to any stock-transfer tax either when issued by the corporation or transferred from one member to another. (1915, c. 115, s. 26; 1925, c. 73, ss. 3, 16.)

#### ART. 10. SHARES IN THE CORPORATION.

##### § 5226. Ownership and transfer of shares.

The capital of a [savings and loan association] shall consist of the payments that have been made to it by the several members thereof on the shares. Shares may be subscribed for and paid in such manner as the by-laws shall prescribe. The [savings and loan association] shall have a lien on the shares of any member and upon any dividends payable thereon for and to the extent of any loan made to him and of any dues or fines payable by him. The [savings and loan association] may, upon the resignation or expulsion of a member, cancel the shares of such member and apply the withdrawal value of such shares towards the liquidation of the member's indebtedness.

A [savings and loan association] may, if the by-laws so provide, charge an entrance fee for each share subscribed, to be paid by the shareholder upon his election to membership.

Fully paid shares of a [savings and loan association] may be transferred to any person eligible for membership, upon such terms as the by-laws may provide, and the payment of a transfer fee shall not exceed twenty-five cents per share. (1915, c. 115, s. 13; 1925, c. 73, s. 3.)

##### § 5228. Fines and penalties.

For failure by any member of a [savings and loan association] to meet his payments on shares when due, such fines and other penalties may be imposed upon the delinquent member as the by-laws provide. Such fines shall not exceed two per centum per month or a fraction thereof on amounts due, except that a minimum fine of five cents may be imposed. (1915, c. 115, s. 15; 1925, c. 73, s. 3.)

##### § 5230. Who may become members.

The membership of the corporation shall consist of those persons who have been duly elected to membership and who have subscribed for one or more shares and have paid for the same in whole or in part, together with the entrance fee as provided in the by-laws, and have complied with such other requirements as the by-laws may contain. No [savings and loan association] shall ever pay any commission or offer compensation for the securing of members or on the sale of shares. (1915, c. 115, s. 6; 1925, c. 73, s. 3.)

**§ 5231. Expulsion and withdrawal of members.**

The board of directors may expel from the corporation any member who has not carried out his engagement with the corporation, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this subchapter or of the by-laws, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt. The members at a regularly called meeting may expel from the corporation any member who has become intemperate or in any way financially irresponsible; no member shall be expelled until he has been informed in writing of the charges against him and an opportunity has been given him, after reasonable notice, to be heard thereon.

A member may withdraw from a [savings and loan association] by filing a written notice of his intention to withdraw.

The amounts paid in on shares or deposits by an expelled or withdrawing member, with any dividends credited to his shares and any interest accrued on his deposits to the date of expulsion or withdrawal, shall be paid to such member, but in the order of expulsion or withdrawal and only as funds therefor become available, after deducting any amounts due to the corporation by such member. The member shall have no further right in the [savings and loan association] or to any of its benefits, but such expulsion or withdrawal shall not operate to relieve the member from any remaining liability to the corporation. (1915, c. 115, s. 23; 1925, c. 73, s. 3.)

**§ 5233. Election of directors and committees.**

1. *Number elected.* At the annual meeting the members shall elect a board of directors of not less than five members, a credit committee and a supervisory committee of not less than three members each. However, in [savings and loan associations] whose business office is located in places other than incorporated cities, the board of directors as such may also be the credit committee. Except as hereinafter specified, no member of the board shall be a member of either of such committees, nor shall one person be a member of more than one of such committees. All members of committees and all directors, as well as all officers whom they may elect, shall be sworn, and shall hold their several offices for such term as may be determined by the by-laws.

2. *Oath of office.* The Oath of each director, officer, and member of committee shall be the oath of the individual taking the same that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such corporation, and will not knowingly violate or willingly permit to be violated any of the provisions of law applicable to such corporation, and that he is the owner in good faith and in his own right on the books of the corporation of at least one share therein. Such oath shall be subscribed by the individual making it and certified by the officer before whom it is taken, and shall immediately be transmitted to the superintendent of [savings and loan associations] and filed and preserved in his office. (1915, c. 115, s. 9; 1925, c. 73, s. 3.)



## ART. 12. SUPERVISION AND CONTROL

**§ 5237. Subject to superintendent of savings and loan associations.**

Corporations organized under the provisions of this subchapter shall be subject to the supervision of the superintendent of [savings and loan associations.] (1915, c. 115, s. 7; 1925, c. 73, s. 3.)

**§ 5238. Annual reports; penalty.**

Every corporation organized under this subchapter shall, in January of each year, make a report for the previous calendar year to the superintendent of [savings and loan associations] giving such information as he shall require, which report shall be verified by the oath of the treasurer and secretary, [and] by the oath of a majority of the members of the supervisory committee, and it shall make such other and further reports under the like oath as the superintendent shall demand at any time.

Any such corporation which neglects to make an annual report within the month of January, or any of the others required by the superintendent of [savings and loan associations] at the time fixed by the superintendent, shall forfeit to the state five dollars for each day such neglect continues. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 7.)

**§ 5239. Annual examinations required.**

The superintendent of [savings and loan associations] shall cause every such corporation to be examined once a year and whenever he deems it necessary. The examiners appointed by him shall be given free access to all books, papers, securities, and other sources of information in respect to the corporation; and for the purpose of such examination the superintendent shall have power and authority to subpoena and examine personally, or by one of his deputies or examiners, witnesses on oath and documents, whether such witnesses are members of the corporation or not, and whether such documents are documents of the corporation or not. (1915, c. 115, s. 7; 1925, c. 73, s. 3.)

**§ 5240. Revocation of certificate.**

If any such corporation shall neglect to make its annual report, as provided in this article, [or any other report required by the superintendent of savings and loan associations] for more than fifteen days, or shall fail to pay the charges required, including the fines for delay in filing reports, the superintendent of [savings and loan associations] shall give notice to such corporation of his intention to revoke the certificate of approval of the corporation for such neglect or failure, and if such neglect or failure continues for fifteen days after such notice, the said superintendent shall, at his discretion, revoke the certificate, and he, personally or by one of his deputies, shall take possession of the property and business of the corpora-

tion and retain possession until such time as he may permit it to resume business, or until its affairs be finally liquidated as provided in the banking laws of the state. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 8.)

### § 5241. Deficits supplied; business discontinued.

If it shall appear to the superintendent of [savings and loan associations] by any examination or report that any such corporation is insolvent, or that it has violated any of the provisions of this subchapter or any other law of the state, he may, by an order made over his hand and official seal, after a hearing or an opportunity for a hearing given the accused corporation, direct any such corporation to discontinue the illegal methods or practices mentioned in the order to make good any deficit. A deficit, in the discretion of the superintendent of [savings and loan associations] may be made good by an assessment on the members in proportion to the shares held by each member. If any such corporation shall not comply with such order within [‘the time stipulated after the same shall have been delivered in person or shall have been mailed to the last address filed by such corporation in the office of the superintendent of savings and loan associations: *Provided*, that not more than thirty (30) days shall be allowed.’] the superintendent shall thereupon take possession of the property and business of such corporation and retain such possession until such time as he may permit it to resume business or its affairs be finally liquidated, as provided in the banking law of the state. (1915, c. 115, s. 7; 1925, c. 73, ss. 3, 9.)

## Subchapter IV. Co-Operative Associations

### ART. 13. ORGANIZATION OF ASSOCIATIONS

#### § 5242. Nature of the association.

Any number of persons, not less than five, may associate themselves as a [mutual] association, society, company, or exchange, for the purpose of conducting any agricultural, [horticultural, forestry] dairy, mercantile, mining, manufacturing, [telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage,] or mechanical business on the [mutual] plan. For the purposes of this subchapter, the words association, company, corporation, exchange, society, or union shall be construed to mean the same. (1915, c. 144, s. 1; 1925, c. 179, ss. 1, 2.)

#### § 5243. Use of term restricted.

No corporation or association hereinafter organized for doing business for profit in this state shall be entitled to use the term [“mutual”] as part of its corporate or other business name or title, unless it has complied with the provisions of this subchapter; and any corporation or association violating the provision of this sec-



tion may be enjoined from doing business under such name at the instance of any shareholder of any association legally organized under this subchapter. (1915, c. 144, s. 18; 1925, c. 179, s. 1.)

### **§ 5247. By-laws adopted.**

At the time of making the articles of incorporation the incorporators shall make by-laws which shall provide:

1. The name of the corporation.
2. The purposes for which it is formed.
3. Qualifications for membership.
4. The date of the annual meeting; the manner in which members shall be notified of meetings; the number of members which shall constitute a quorum at the meetings, and regulations as to voting.
5. The number of members of the board of directors; powers and duties; the compensation and duties of officers elected by the board or directors.
6. In the case of selling agencies or productive societies, regulations for grading.
7. In the case of selling agencies or productive societies, regulations governing the sale of products by the members through the organization.
8. The par value of the shares of capital stock.
9. The conditions upon which shares may be issued, paid in, transferred, and withdrawn.
10. The manner in which the reserve fund shall be accumulated.
11. The manner in which the dividends shall be determined and paid to members.
- [12. Associations, societies, companies or exchanges, organized hereunder to engage in the telephone or electric light business upon a mutual basis, shall adopt a by-law limiting the patrons and subscribers to members of the association.] (1915, c. 144, s. 5; 1925, c. 179, s. 4.)

### **§ 5248. General corporation law applied.**

All [mutual] associations shall be maintained in accordance with the general corporation law, except as otherwise provided for in this subchapter. (1915, c. 144, s. 17; 1925, c. 179, s. 1.)

### **§ 5249. Other corporations admitted.**

All [mutual] corporations, companies, or associations heretofore organized and doing business under prior statutes, or which attempted to so organize and do business, shall have the benefit of all of the provisions of this subchapter, and be bound thereby on filing with the secretary of state a written declaration, signed and sworn to by the president and secretary, to the effect that the [mutual] company or association has by a majority vote of its shareholders decided to ac-

cept the benefits of and to be bound by the provisions of this subchapter. No association organized under this subchapter shall be required to do or perform anything not specifically required herein, in order to become a corporation. (1915, c. 144, s. 16; 1925, c. 179, s. 1.)

#### ART. 14. STOCKHOLDERS AND OFFICERS.

##### **§ 5251. Ownership of shares limited.**

No shareholder in any such association shall own shares of a greater aggregate par value than twenty per cent of the paid-in capital stock, except as hereinafter provided, or be entitled to more than one vote. A [mutual] association shall reserve the right of purchasing the stock of any member whose stock is for sale, and may restrict the transfer of stock to such persons as are made eligible to membership in the by-laws. (1915, c. 144, s. 9; 1925, c. 179, s. 1.)

#### ART. 15. POWERS AND DUTIES

##### **§ 5255. Nature of business authorized.**

An association created under this subchapter shall have power to conduct any agricultural, [horticultural, forestry], dairy, mercantile, mining, manufacturing, [telephone, electric light, power, storage, refrigeration, flume, irrigation, water, sewerage,] or mechanical business, on the [mutual] plan. (1915, c. 144, s. 8; 1925, c. 179, ss. 1, 3.)

##### **§ 5257. Apportionment of earnings.**

The directors, subject to revision by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock, not exceeding six per cent per annum, then setting aside not less than ten per cent of the net profits for a reserve fund, until an amount has been accumulated in the reserve fund equal to thirty per cent of the paid-up capital stock, and not less than two per cent thereof for an educational fund to be used in teaching coöperation, and the remainder of the net profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employees, and one-half of such uniform dividend to nonshareholders on the amount of their purchase, which may be credited to the account of such nonshareholders on account of capital stock of the association; but in selling agencies such as fruit, truck, peanuts, and cotton growers' associations, and in productive associations such as creameries, canneries, warehouses, factories and the like, dividends shall be prorated on raw materials delivered instead of on goods purchased. In case the association is both a selling and productive concern, [or a service and distributing association] the dividends may be on both raw material delivered and on goods [or service] purchased by patrons. (1915, c. 144, s. 13; 1925, c. 179, s. 5.)



## Subchapter V. Marketing Associations

### ART. 16. PURPOSES AND ORGANIZATION

#### § 5259 (a). Declaration of policy.

See notes to § 5259(m).

**Validity.** — "The Tobacco Growers Coöperative Association Act, this and the following section of this chapter, was construed and its validity sustained in *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174." *Tobacco Growers Co-op. Ass'n v. Bissett*, 187 N. C. 180, 182, 121 S. E. 446.

**Same—Assailed on Ground of Insufficient Signers.** — In *Pittman v. Tobacco Growers Co-op. Ass'n*, 187 N. C. 340, 341, 121 S. E. 634, the Court said: "There was no error in setting aside the response to the first issue. The defendant association was duly organized by virtue of a statute, the legality of which has been affirmed by this Court in *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174, and has been recognized in other cases. Its validity cannot be assailed in the manner thus attempted by alleging an insufficient number of signers. This is a collateral attack and is not a direct attack by the State upon a quo warranto to vitiate the incorporation. Besides, there was no evidence of an insufficient sign-up, and if the plaintiff could have brought this collateral attack to vitiate the organization, the burden was upon him to produce evidence to that effect. The court properly set aside the verdict upon that issue."

#### § 5259 (m). Associations not in restraint of trade.

**Presumption in Favor of Validity.**—The legal presumption is in favor of the validity of the marketing contract made by a member with the coöperative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character plainly appears; and in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the Anti-trust Law, or in restraint of trade. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174.

**Governmental Control Insuring against Monopoly.**—The agreement to form an association under this chapter, known as the Coöperative Marketing Act, becomes binding at once upon its being accepted by the association after incorporation; and the marketing provisions being available only to the members of the association, and the charter of the association being subject to repeal by the Legislature whenever it should become dangerous to the public, and subject to the intervention of the court to prevent monopoly; the association having no capital stock or surplus, nor credit, except as given by statute, which may be withdrawn at any time, and wholly dependent to borrow money in large sums necessary to the carrying out of its plans, under the control of the Federal Reserve Banking System, under such terms as the Federal board deems consistent with the public welfare, which will not permit a monopoly, it was held, that the governmental control thus to be exercised renders the coöperative plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174.

This chapter, known as the Coöperative Marketing Act, is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members, to enable them to obtain a fair price therefor without profit to the organization itself, in opposition to any agreement among the manufacturers or others that may have a contrary effect, and under conditions

that will keep the public informed of its methods, and control them under governmental supervision when they go beyond a protective policy or become monopolistic in effect; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174.

### § 5259 (o). Application of general corporation laws.

**Holding over of Crops.**—The provisions in the charter that an association under the provision of the coöperative marketing acts exists for five years, is the same as applies to a period limited for the existence of other corporations formed under other legislative acts, and does not contemplate that the association hold over the crops raised in one year for one or more successive years, such being destructive of the purposes of the association as contemplated by the statute. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174.

## ART. 17. MEMBERS AND OFFICERS

### § 5259 (s). Directors; election.

**In General.**—The provision in the Coöperative Marketing Act for the appointment of a director by each of the governors of the three states of Virginia, North Carolina, and South Carolina is not objectionable on the ground that these three directors can control the other twenty-two chosen by the members under the plan outlined in the statute, the purpose therein being that the public may have opportunity to learn at all times how the business is being conducted, and to insure that it will be carried on in a manner that will not be detrimental to the public welfare. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174.

## ART. 18. POWERS, DUTIES, AND LIABILITIES

### § 5259 (x). Powers.

**Formation of Subsidiary Companies.**—Objection to the validity of the Coöperative Marketing Act that an organization of tobacco growers thereunder has formed subsidiary or minor companies to cure tobacco, redry it, and store it, prize it, and get it ready for market, is without merit; the money for such purpose being very small, specifically limited and under a complete system for its return to its members who have contributed it, it being necessary for the association to own or control enough of the facilities to make effective the authorized purposes of its organization. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174.

### § 5259 (y). Marketing contract.

**In General.**—A coöperative association formed under the provisions of chapter 87, Public Laws of 1921, whereby its members agree to sell and deliver to it all of the tobacco owned and produced by or for him or acquired by him as landlord or tenant, being, among other things, for the purpose of steadying the market and enabling the member to obtain a proper price for his tobacco and compensate him for his labor, skill, etc., exists by virtue of a constitutional statute, and the provisions of its standard contract with its members are valid and enforceable. *Tobacco Growers Co-op. Ass'n v. Battle*, 187 N. C. 260, 121 S. E. 629.

**Remedies for Breach by Member.**—An organization formed under the provision of Law 1921, ch. 87, known as the Coöperative Marketing Act, being permitted only to handle the product of its own members without



profit, the provisions of the act are valid allowing it to contract with its members for the sole handling of their crops, and upon the breach by a member of this contract, the recovery of liquidated damages and all cost of the action, including premiums for bonds, expenses, and fees, and affording it equitable relief by injunction to prevent the further breach of the contract by a member, and a decree of specific performance; and also allowing, pending the adjudication of such actions, a temporary restraining order against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond. *Tobacco Growers Co-op. Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174.

**Same—Liquidated Damages.**—The fact that the coöperative marketing contract provides for liquidated damages does not give the association an adequate remedy at law for its members otherwise selling their tobacco as provided in the marketing contract, as such would seriously menace the existence of the association for the purpose for which it was incorporated under the provisions of the statute (chapter 87, Public Laws 1921). *Tobacco Growers Co-op. Ass'n v. Pollock*, 187 N. C. 409, 121 S. E. 763.

**Same—Specific Performance.**—Injuries from the breach of contract by a member with the Coöperative Tobacco Marketing Association, formed under the provisions of chapter 87, Public Laws of 1921, to market his tobacco, etc., cannot be adequately compensated for in damages, and the equitable remedy of specific performance as allowed by the statute will be upheld by the courts. *Tobacco Growers Co-op. Ass'n v. Battle*, 187 N. C. 260, 121 S. E. 629.

**Same—Injunction.**—The provisions of the standard contract made by the Tobacco Coöperative Marketing Association with its members are valid under a constitutional statute, and upon the alleged breach thereof on the part of the member in its material parts, the equitable remedy by injunction is available to the association. *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 121 S. E. 631.

In *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 254, 121 S. E. 631, the Court said: "The decided cases in this jurisdiction are also to the effect that in an action of this character, and on the question of plaintiff's right to an injunction, this Court is not concluded by the findings of the trial judge, but will itself pass upon and determine the facts upon which the decision shall be properly made to depend."

Where in the suit of a tobacco marketing association for injunctive relief against the defendant for breaching his contract to market his tobacco with it according to its terms, he resists upon the ground that he had not become a member, and the plaintiff's evidence tends strongly to show to the contrary, it was held that the injunction should be continued to the hearing upon the principle that the plaintiff has established an apparent right to the relief sought, and that the writ is reasonably necessary to protect the property pending the inquiry. *Tobacco Growers Co-op. Ass'n v. Battle*, 187 N. C. 260, 121 S. E. 629.

On appeal from the denial of the continuance of a restraining order the facts as found by the Superior Court judge are not conclusive on the Supreme Court, and the latter may review the evidence appearing in the record. *Tobacco Growers Co-op. Ass'n v. Battle*, 187 N. C. 260, 121 S. E. 629.

The right given by chapter 87, section 17c, Laws of 1921, to a tobacco marketing association formed under the provisions of said chapter 87, to injunctive relief against a member breaching his contract, upon filing the bond and verified complaint showing such breach, or threatened breach, relates only to the initial process and does not, and is not, intended to withdraw from the courts their constitutional right to pass upon the question of continuing the injunction to the final hearing upon the issues, under approved principles of law and equity. *Tobacco Growers Co-op. Ass'n v. Bland*, 187 N. C. 356, 121 S. E. 636.

A tobacco marketing association, formed under the provisions of the statute, upon the hearing as to continuing its temporary restraining order, must bring itself within the equitable principles applicable, and the temporary restraining order obtained under the provisions of the statute will not be continued if the breach of the contract complained of was caused by the plaintiff's own default, or if the continuance of the temporary restraining order will work greater injury than its dissolution by the court. *Tobacco Growers Co-op. Ass'n v. Bland*, 187 N. C. 356, 121 S. E. 636.

Upon the application of a tobacco marketing association formed under the statute for an injunction against its member from breaching his contract by failure to market his tobacco through the association, the defendant made it properly to appear upon the hearing as to continuing the preliminary restraining order that he had complied with his contract as far as he was able, but that the failure of the plaintiff to pay him for the large portion of his crop marketed through it under the terms of the contract forced him to market otherwise a small portion of his crop to raise money for supplies necessary for the support of himself and family, it was held that the general denial by the plaintiff of owing the defendant anything under the contract, without detailed statement as to the account between them from information available to it, was insufficient, and an order of the Superior Court judge dissolving the restraining order upon defendant's giving a proper bond for plaintiff's protection was proper under the evidence in this case. *Tobacco Growers Co-op. Ass'n v. Bland*, 187 N. C. 356, 121 S. E. 636.

In this suit for an injunction by a tobacco growers association, incorporated under the provisions of the statute, against its alleged member for selling his tobacco in violation of his contract, depending largely upon the question of his membership, it was held that the restraining order should be continued to the hearing under the authority of *Tobacco Growers Co-op. Ass'n v. Battle*, 187 N. C. 260, 121 S. E. 629. *Tobacco Growers Co-op. Ass'n v. Spikes*, 187 N. C. 367, 121 S. E. 636.

In a suit by a cooperative tobacco association, formed under the provisions of Public Laws 1921, ch. 87, seeking injunctive relief against its member for disposing of his tobacco elsewhere than through plaintiff corporation, in violation of his contract, authorized by the statute, and in collusion with his codefendant, a tobacco warehouse association, in fraud of the plaintiff's contractual rights, an answer of the defendant member, admitting that he had so disposed of his tobacco, and seeking rescission of his contract upon allegation of the plaintiff's fraud and mismanagement and failure to make the returns upon sales of tobacco it had theretofore handled for the member defendant, etc., raises an issue vitally affecting the business of the plaintiff, an adverse decision being likely to work an irreparable injury, and the temporary restraining order theretofore granted should, upon sufficient evidence, be continued to the hearing. *Tobacco Growers Co-op. Ass'n v. Pollock*, 187 N. C. 409, 121 S. E. 763.

In *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 256, 121 S. E. 631, the Court said: "The matter here is not further pursued for the reason that the mortgagee is not thus far a party, and until he is, his rightful claims should not and cannot be in any way impaired and jeopardized in this proceeding, nor, as a rule, should a grower's rights to place a mortgage on his crop for the bona fide purpose of raising the same be in any way hindered or lightly interfered with, but as to this defendant, and on the facts as presented in this record, he having practically admitted that he has broken his contract with plaintiff, and intends to continue to do so, it is not for him to decide by his own *ipse dixit* what is or is not a valid lien, or the extent of it, and in our opinion he should be restrained to the hearing from voluntarily and personally making any further disposition of his crop other than as required by his contract with plaintiffs, either of the crop of 1923 or any other crop coming into his



possession and control and ownership during the life of the contract, and subject to its provisions."

*In Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 256, 121 S. E. 631, the Court said: "This injunction, however, should be drawn without prejudice to the rights of the mortgagee or lien holder to demand and receive of defendant, or to enforce delivery by any appropriate procedure, of a sufficient amount of the tobacco or other property included in his mortgage, to satisfy his claims to the extent that the same constitute a valid lien superior to the rights and interests of plaintiff under its contract. If such a lien and the amount and extent of it cannot be agreed upon and adjusted it would seem that the lien claimant should become or be made a party of record, that authoritative and final disposition should be made of the matter."

**Same—Justification for Breach.**—A penalty in a small sum erroneously attempted to be imposed on a member by the tobacco marketing association, under its contract for the failure to market the tobacco of his nonmember tenant, is not of sufficient proportionate importance to justify an entire severance of the contract relation by the member thereof. *Tobacco Growers Co-op. Ass'n v. Bland*, 187 N. C. 356, 121 S. E. 636.

**Same—Same—Shown by Parol.** — Where a member of a coöperative marketing association, formed under the statute, resists the performance of marketing his tobacco with the association under the usual and written contract, he may show by parol that he had never been a member thereof or obligated by the contract sued on, for the failure of the association to obtain a certain membership within the territory. *Tobacco Growers Co-op. Ass'n v. Moss*, 187 N. C. 421, 121 S. E. 738.

**Liability of Landlord for Nonmember Tenant.** — In *Tobacco Growers Co-op. Ass'n v. Bissett*, 187 N. C. 180, 183, 121 S. E. 446, it was said: "Under paragraph 2 of the contract the defendant agreed 'to deliver to the association all of the tobacco produced by or for him or acquired by him as landlord or lessor.' Paragraph 11 of the contract provides: 'If he (the member) produce any tobacco or acquire or own any interest in tobacco as landlord or lessor during the term hereof, it shall be included under the terms of this agreement, and must be sold only to the association.' It would seem clear, therefore, that the only tobacco covered by this contract is tobacco of the member produced on lands either owned or rented by him. Neither the plaintiff nor the defendant agreed that the defendant would be compelled to either deliver tobacco belonging to a nonmember tenant nor to pay five cents a pound penalty for failure to do so. It is significant that, though the act on its face has been carefully and skillfully drawn, it is nowhere stated in it that the landlord shall be compelled to deliver all tobacco produced upon his lands by nonmember tenants. Such provision was made in the Kentucky statute and in the basis upon which was decided the case in the Circuit Court of McCracken County of *Tobacco Growers Coöperative Association v. Feagin*, decided 19 January, 1924, and which is cited by plaintiff."

**Right of Member to Mortgage Crop.** — In *Tobacco Growers Co-op. Ass'n v. Patterson*, 187 N. C. 252, 256, 121 S. E. 631, it was said: "It is true that a member may place a mortgage or crop lien on his crop for the current year for the purpose of enabling him to successfully cultivate and produce the same, the contract between plaintiffs and defendant clearly contemplates such a mortgage, and good policy requires that such a privilege should never be withdrawn, and we understand that plaintiff has no desire or purpose to interfere with any such claim to the extent that it constitutes a valid and superior lien to plaintiff's rights and interests under the contract, but the evidence of defendant as to the extent and existence of such a lien is not to our mind a full and frank statement concerning it. It appearing that "\$1,021.74 is for a note and \$1,614 for advances and supplies," and that these advances and supplies were re-

quired to enable defendant to make his crop, and what this note is for or when given is not set forth, and whether the instrument is such as to create a valid lien on the crop is not all clear."

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## CHAPTER 94.

### DRAINAGE

#### Subchapter I. Drainage by Individual Owners

##### ART. 1. JURISDICTION IN CLERK OF SUPERIOR COURT

#### § 5274. Amount of contribution for repair ascertained.

**Enlarging or Deepening Canal.**—The method by which the user of a canal by prescriptive right may enlarge or deepen it with an apportionment of the costs, is provided by this section. *Armstrong v. Spruill*, 182 N. C. 1, 108 S. E. 300.

**Same—Liability for Damages.**—Where the user of a canal by prescriptive right enlarge the same, and thereby place water upon the lower proprietor to his damage, they are liable therefor, and, upon conflicting evidence, the issue should be submitted to the jury. *Armstrong v. Spruill*, 182 N. C. 1, 108 S. E. 300.

#### § 5280. Canal for seven years necessity presumed; expense apportioned.

Applied in *Craft & Co. v. Roper Lumber Co.*, 181 N. C. 29, 106 S. E. 138.

#### § 5284. Procedure upon agreement.

**Withdrawal of Petitioners.**—Upon the return day set by the clerk of the court for the hearing of the landowners in a proposed drainage district, it may be shown by those opposed to the petition that some of those who signed it desired to withdraw, and that eliminating their names the petitioners would not represent a majority of the landowners in the district, or such owning three-fourths of the lands, as the statute requires. *Armstrong v. Beaman*, 181 N. C. 11, 105 S. E. 879.

#### Subchapter III. Drainage Districts

##### ART. 5. ESTABLISHMENT OF DISTRICTS

#### § 5312. Jurisdiction to establish districts.

**Proceedings Not Defective for Delay.**—Proceedings for the establishment of a drainage district, this and the following section of this article, bonds to be issued therefor, will not be held as defective because further steps were not taken for several years after they had been commenced, the court holding they were still pending, and because of the fact that the engineer and viewers did not file a profile map showing the surface of the ground, bottom grades, etc., at the time of the final report, as required by sec. 5327, it appearing that this was later done upon order of the board of drainage commissioners, and otherwise the provisions of the statutes had been strictly followed. *Oden v. Bell*, 185 N. C. 403, 117 S. E. 340.



**§ 5314. Petition filed.**

A petition signed by a majority of the resident landowners in a proposed drainage district or by the owners of three-fifths of all the land which will be affected or assessed for the expense of the proposed improvements may be filed in the office of the clerk of the superior court of any county in which a part of the lands is located, setting forth that any specific body or district of land in the county and adjoining counties, described in such a way as to convey an intelligent idea as to the location of such land, is subject to overflow or too wet for cultivation, and the public benefit or utility or the public health, convenience or welfare will be promoted by draining, ditching, or leveeing the same or by changing or improving the natural watercourses, and setting forth therein, as far as practicable, the starting point, route, and terminus and lateral branches, if necessary, of the proposed improvement. [A petition signed by resident landowners in a proposed drainage, district, or owners of land which will be affected or assessed for the expense of the proposed improvement, who constitute less than a majority of all such resident landowners or who own less than three-fifths of all the lands which will be affected or assessed as aforesaid, may be filed under this section, and shall be deemed to be sufficiently signed, if the petition shall have first been submitted to and approved by the board of county commissioners and the board of health of the county in which the petition is filed: *Provided* that the portion of this section in brackets shall apply only to the drainage districts in Rowan county, Robeson county, and Iredell county.] (1909, c. 442, s. 2; 1921, c. 76; 1925, cc. 85, 144.)

**§ 5319. Estimate of expense and manner of payment.**

For local act applicable to Pitt county see 1925, c. 271.

**§ 5325. Condemnation of land.**

**Permanent Damages Recoverable.**—The whole of plaintiff's lands were originally included in a drainage district to be established under the statutory provisions, but the final judgment so restricted and modified the survey, plat and boundaries as to exclude all except a comparatively small portion of the land, the preliminary survey showing that a canal would go through the land included as well as through the land, or a large part thereof, excluded by the final judgment. There was no evidence that ancillary proceedings for this outside lands by condemnation had been resorted to, it was held, that the plaintiff, in his independent action, may elect to recover the permanent damages caused to his land. *Sawyer v. Camden Run Drainage Dist.*, 179 N. C. 182, 102 S. E. 273.

**§ 5327. Nature of survey.**

See note of *Oden v. Bell* under § 5312.

**§ 5336 (a). Local: Advancements by Pitt County.**

That on presentation of petition as authorized by section five thousand three hundred and fourteen of Consolidated Statutes of

one thousand nine hundred and nineteen, and after filing bond as required by section five thousand three hundred and fifteen, said Statutes, and after the clerk has issued summons as directed by said latter section, the board of county commissioners of Pitt County is authorized and empowered, in the exercise of its discretion, in case the proposed drainage district is situate wholly or mostly in said county, to advance to the use of such proposed district to be paid out, on order of said court, and of the general fund of said county, a sum of money sufficient to pay court costs, and the costs incurred by the board of viewers appointed by the court under section five thousand three hundred and seventeen up to the appointment of drainage commission as authorized by section five thousand three hundred and thirty-seven, said Statutes, such advancement shall be repaid to said general fund, after finances have been provided to construct the proposed canal or levee. (1925, c. 205.)

#### ART. 7. CONSTRUCTION OF IMPROVEMENT

##### § 5349. Control and repairs by drainage commissioners.

**Meaning of "Original Assessments."**—Under the provisions of this section the control of Mattamuskeet Drainage District, after its completion, is continued in the board of drainage commissioners for the purpose of its maintenance, and authority is given it to levy assessments therefor on the lands benefited in the same manner and in the same portion as the "original assessments" were made, and collected by the same officers as those by whom the State and county taxes are collected: Held, the term "original assessments" refers to those made for construction work or bonds issued therefor, and the assessments for maintenance should be collected by the sheriff of the county for the purpose of maintenance, as taxes for general county purposes are to be collected by him. *Drainage Comm'rs v. Davis*, 182 N. C. 140, 108 S. E. 506. See notes to secs. 8042, 5369. See notes of this case under § 5369.

#### ART. 8. ASSESSMENTS AND BOND ISSUE

##### § 5369. Fees for collection.

(1911, c. 67, s. 13.)

**In General.**—The relevant sections of the various statutes upon the subject of the collection of assessments on lands in drainage districts by sheriffs and tax collectors, and their compensation therefor, being in *pari materia*, should be construed together by the courts in ascertaining the legislative intent. *Drainage Comm'rs v. Davis*, 182 N. C. 140, 108 S. E. 506.

**Sheriff's Fee.**—The bringing forward of sec. 13, ch. 67, Laws 1911, in C. S., 5369, providing that 2 per cent shall be allowed sheriffs "for collecting the drainage assessments as hereinbefore prescribed," is a legislative construction of section 13 of the prior law, and was intended to restrict the compensation of the sheriff to 2 per cent of the amount of the assessment in drainage districts collected by him, and not to allow him a commission of 5 per cent as in case of taxes collected for general governmental purposes. *Drainage Comm'rs v. Davis*, 182 N. C. 140, 108 S. E. 506. See notes to secs. 8042, 5350.

**Fee of County Treasurer.**—Sec. 13, ch. 67, Laws 1911, from which this



section is derived, dealing with the compensation to be allowed the county treasurer for disbursing the revenue obtained from the sale of bonds of a drainage district, provides but one compensation for all services, i. e., 2 per cent of the revenue derived from the sale of the drainage bonds, and expressly denies compensation for certain other services mentioned, and if not, then under the doctrine of *expressio unius est exclusio alterius* the treasurer is not entitled to compensation by way of commissions on the moneys derived from assessments for maintenance. *Board v. Credle*, 182 N. C. 442, 109 S. E. 88.

*Semble*, section 3910, cannot be construed to allow additional compensation to the county treasurer for receiving and disbursing money of a drainage district under sec. 36, ch. 442, Laws of 1909, the acts being unrelated; but, if otherwise, the county treasurer must bring himself within the provisions of sec. 3910 by showing the amount claimed was allowed to him in the discretion of the county commissioners, within the limit fixed by the statute, and that the regular procedure followed as to the drawing of the warrants by the drainage commission upon funds on hand derived from collections for the benefit of the drainage district alone, etc. *Board v. Credle*, 182 N. C. 442, 109 S. E. 88.

## ART. 10. GENERAL PROVISIONS

### § 5381. Local drainage laws not repealed.

**Special Local Act Not Affected.**—Where a special local statute for the formation and operation of a drainage district is complete in itself in all its details, a general law expressing itself applicable to all such drainage districts in the State, adding further duties and making the failure of the commissioners to file certain reports an indictable offense, C. S., 5374, 5375, will not be construed to apply unless special reference is made to the special local act. *State v. Gettys*, 181 N. C. 580, 107 S. E. 307.

Where a public-local law is complete in all of its details in establishing and maintaining a special drainage district, and requires the commissioners to keep "a perfect record of all dealings and transactions," this record is subject to inspection by all interested in the district; and C. S., 5374-5, subsequently enacted, which among other things, makes it an indictable offense for the failure of the commissioners to make certain reports and to publish them, has no application, especially as this section provides that the subchapter on Drainage Districts "shall not repeal or change local drainage laws already enacted." *State v. Gettys*, 181 N. C. 580, 107 S. E. 307.

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## CHAPTER 95

## EDUCATION

### Subchapter I. The Public School System

#### ART. 1. INTERPRETATION

### § 5383. A general and uniform system of schools.

**In General.**—The statute, chapter 136, Laws of 1923, is a codification with certain modifications or changes of the then existing school laws of the State upon a county-wide plan of organization designing to make them more harmonious and efficient under a workable system for the counties adopting it. *Blue v. Board*, 187 N. C. 431, 122 S. E. 19.

**Subchapter II. Administrative Organization****ART. 2. THE STATE BOARD OF EDUCATION****§ 5394 (a). Power to purchase certain lands.**

The State Board of Education is authorized to purchase, at public sale, any land or lands upon which it has a mortgage or deed of trust securing the purchase price, or any part thereof, and when any land so sold and purchased by the said Board of Education is a part of a drainage district already constituted, upon which said land assessments have been levied for the maintenance thereof, such assessments shall be paid by the said State Board of Education, as if said land had been purchased or owned by an individual. (1924, c. 24.)

**§ 5394 (b). Power to adjust debts for purchase price of lands sold.**

The State Board of Education is hereby authorized and empowered to settle, compromise or otherwise adjust any indebtedness due it upon the purchase price of any land or property sold by it, or to cancel and surrender the notes, mortgages, trust deeds or other evidence of indebtedness without payment, when, in the discretion of the said board, it appears that it is proper to do so. Said Board of Education is further authorized and empowered to sell or otherwise dispose of any such notes, mortgages, trust deeds, or other evidence of indebtedness. (1925, c. 220.)

**ART. 3(A) EDUCATIONAL COMMISSION****§ 5409 (a). Commission created.**

An educational commission is hereby created, to be composed of twelve members to be appointed by the Governor. (1925, c. 203, s. 1.)

**§ 5409 (b). Appointment; oath.**

The said commission shall be appointed on or about the first day of July, one thousand nine hundred and twenty-five, and immediately after they accept such appointment, shall take an oath, to be administered by some person authorized by law to administer oaths, to perform their duties faithfully and to the best of their ability. (1925, c. 203, s. 2.)

**§ 5409 (c). No compensation; expenses.**

The said commission shall serve without compensation, except they may be allowed their actual, railroad or other expense incurred in traveling, and their expenses of sustenance in addition thereto, not to exceed six dollars per day, and their account for such expenses shall be approved by the Budget Bureau and paid out of any funds under the control of the State Board of Education, in the same man-



ner as other administrative expenses of said board are paid. (1925, c. 203, s. 3.)

**§ 5409 (d). Meeting; organization; clerical assistance.**

The said commission shall meet at the call of the Governor in the city of Raleigh, and organize by the election of a chairman and a secretary, and the secretary of this commission need not be a member thereof, and the State Board of Education shall furnish such clerical assistance as may be necessary, the expense thereof to be paid out of any fund under its control. (1925, c. 203, s. 4.)

**§ 5409 (e). Duties.**

The said commission shall have power and shall be charged with the following duties:

(a) To make a complete investigation and survey of the common school system now in use in this State.

(b) To make a complete investigation and survey of the system of higher education now in use in this State.

(c) To make a complete investigation of the State equalizing fund and its administration in the several counties of the State.

(d) To investigate the method of determining the cost of the various phases of the operation of the State educational system, both as to institutions of higher learning, and as to the conduct of high school and grammar school systems now in use.

(e) To collect, compile and disseminate educational data and information in order to give the people of the State the complete status of the cost and results of the State's educational activities.

(f) To do or perform any other thing or duty which, in the opinion of the said commission, is proper and necessary, with reference to the relation of the public to the present system of higher and common school education in this State. (1925, c. 203, s. 5.)

**§ 5409 (f). Policy and purpose of article.**

The policy and purpose of this article, and of the commission hereby created shall be constructive and for the purpose of devising a means of informing the public, at a minimum cost, fully in regard to the State's educational problems, and for the purpose of aiding and helping in the conduct of all phases of the common school and higher educational system in North Carolina. (1925, c. 203, s. 6.)

**§ 5409 (g). Term of office.**

The said commission shall continue in office until, in the opinion of the Governor, they have completed the purposes of this article and shall have filed their report. The report of the commission and all information collected shall be transmitted to the General Assembly by the Governor, with such suggestions and recommendations as he may deem necessary. (1925, c. 203, s. 7.)

**§ 5409 (h). Who appointed.**

The Governor is authorized to appoint as members of said commission such persons as may now be officers or employees of the State, or of any of its institutions, and such officers or employees shall receive their actual expenses as herein provided. (1925, c. 203, s. 8.)

**Subchapter III. Duties, Powers and Responsibilities of County Boards of Education****ART. 5. THE DIRECTION AND SUPERVISION OF THE SCHOOL SYSTEM****§ 5435. Continuous school census.**

The state board of education shall adopt such rules and regulations as may be necessary for taking a complete census of the school population and for installing and keeping in the office of the county superintendent in each county of the state a continuous census of the school population. The cost of taking and keeping the census shall be a legitimate item in the budget and shall be paid out of the incidental fund. [If any parent, guardian, or other person having the custody of a child, refuses to give any properly authorized census-taker, teacher, school principal, or other school official charged with the duty of obtaining the census of the school population of any district, the necessary information to enable such person to obtain an accurate and correct census, or shall knowingly and willfully make any false statement to any person duly authorized to take the school census of any district relative to the age or the mental or physical condition of any child, he shall be deemed guilty of a misdemeanor and shall be fined not to exceed twenty-five dollars or imprisoned not to exceed thirty days in the discretion of the court.] (1921, c. 179, s. 16; 1925, c. 95.)

**ART. 9. ERECTION, REPAIR AND EQUIPMENT OF SCHOOL BUILDINGS****§ 5468. Erection of schoolhouses.**

The building of all new schoolhouses and the repairing of all old schoolhouses over which the county board of education has jurisdiction shall be under the control and direction of and by contract with the county board of education. But the board shall not be authorized to invest any money in any new house that is not built in accordance with plans approved by the state superintendent, nor for more money than is made available for its erection. All contracts for buildings shall be in writing, and all buildings shall be inspected, received, and approved by the county superintendent of public instruction before full payment is made therefor: *Provided*, this section shall not prohibit county boards of education and boards of trustees from having the janitor or any other regular employee to repair the buildings.



[From any moneys loaned by the State to any one of the several counties for the erection, repair or equipment of school buildings, teacherages and dormitories, the State Board of Education, under such rules as it may deem advisable, not inconsistent with the provisions of this article, may retain an amount not to exceed fifteen per cent of said loan until such completed buildings, erected or repaired, in whole or in part, from such loan funds, shall have been approved by such agent as the State Board of Education may designate: *Provided*, that upon the proper approval of the completed building, the State Treasurer, upon requisition of the State Superintendent of Public Instruction, authorized and directed by the State Board of Education, shall pay to the treasurer of the county the remaining part of said loan, together with interest from the date of the loan at a rate not less than three per cent on monthly balances.] (C. S., 5415; 1923, c. 136, s. 60; 1925, c. 221.)

### § 5469. How to secure suitable sites.

The county board of education [or board of trustees of any special charter district] may receive by gift or by purchase suitable sites for schoolhouses or other school buildings. But whenever [any such] board is unable to obtain a suitable site for a school or school building by gift or purchase, the board shall report to the county superintendent of public instruction, who shall, upon five days notice to the owner or owners of the land, apply to the clerk of the superior court of the county in which the land is situated for the appointment of three appraisers, who shall lay off by metes and bounds not more than ten acres, and shall assess the value thereof. They shall make a written report of their proceedings, to be signed by them, or by a majority of them, to the clerk within five days of their appointment, who shall enter the same upon the records of the court. The appraisers and officers shall serve without compensation. If the report is confirmed by the clerk, the chairman and the secretary of the board shall issue an order on the treasurer of the county school fund [or if a charter district, upon the treasurer of such charter district], in favor of the owner of the land thus laid off, and upon the payment, or offer of payment, of this order, the title to such land shall vest in fee simple in the corporation. Any person aggrieved by the action of the appraisers may appeal to the superior court in term, upon giving bond to secure the board against such costs as may be incurred on account of the appeal not being prosecuted with effect. If the lands sought to be condemned hereunder, or any part of said lands, shall be owned by a nonresident of the state, before the clerk shall appoint appraisers therefor, notice to such nonresident owners shall be given of such proceedings to condemn, by publication for thirty days in some newspaper published in the county, and if no newspaper is published in the county, then by posting such notice at the courthouse door and three other public places in the county for the period of thirty days. (C. S., 5416; 1923, c. 136, s. 61; 1924, c. 121, s. 1.)

**§ 5472. Board cannot erect or repair building unless site is owned by board.**

The county board of education shall make no contract for the erection or repair of any school building unless the site on which it is located is owned by the county board of education, and the deed for the same is properly registered and deposited with clerk of the court. [*Provided*, it shall be lawful for the county board of education to borrow from the State Literary or Special Building Funds for the benefit of special charter districts and to allocate the proceeds of the county school building bonds between special charter and county schools in proportion to the respective needs of the charter schools and the county schools at the time when such county bonds are authorized: *Provided further*, that the title to the site in any special charter district so aided shall be vested in the board of trustees of the charter district.] (C. S., 5450; 1923, c. 136, s. 64; 1925, c. 180, s. 1.)

ART. 10. CREATING AND CONSOLIDATING SCHOOL DISTRICTS

**§ 5480. School districts.**

**Constitutionality.**—Under the provisions of the statute providing for a county-wide system of education, the school board, by proper procedure, is authorized to divide an existent school district therein (chapter 136, Laws of 1923, article 6); and the statute in relation thereto is constitutional and valid with the limitation that provision be presently and ultimately made for proper school facilities for the children therein. *Sparkman v. Board*, 187 N. C. 241, 121 S. E. 531. Cited and approved. *Blue v. Board*, 187 N. C. 431, 122 S. E. 19.

**Formation of High School Districts.**—Our statutes providing that the county board of education shall divide the townships, or the entire county, etc., into convenient school districts, etc., C. S., 5469, (C. S. Vol. III, § 5480) and authorizing and empowering the board to redistrict the entire county and consolidate school districts, etc., C. S., 5473, (C. S. Vol. III, § 5483) was passed in pursuance of Article IX, section 3, of the State Constitution, and refers to the establishment, consolidation, etc., of districts in the sense of territorial or geographical regions, and not to the dividing or segregation of the pupils; and an attempt of the county board of education thereunder to form a high school district in a territory comprised of several public school districts, is without authority and invalid. As to whether this may be done under the Public Laws of 1921, ch. 179, is neither before the Court nor decided on this appeal. *Woosley v. Commissioners*, 182 N. C. 429, 109 S. E. 368. See notes of this case under Const. Art. II, § 29.

**§ 5481. County-wide plan of organization.**

The county board of education shall create no new district nor shall it divide or abolish a district, nor shall it consolidate districts or parts of districts, except in accordance with a county-wide plan of organization, as follows:

1. The county board of education shall present a diagram or map of the county showing the present location of each district, the position of each, the location of roads, streams and other natural bar-



riers, the number of children in each district, the size and condition of each school building in each county. The county board of education shall then prepare a county-wide plan for the organization of all the schools of the county. This plan shall indicate the proposed changes to be made and how districts or parts of districts are proposed to be consolidated so as to work out a more advantageous school system for the entire county.

2. Before adopting the county-wide plan, the county board of education shall call a meeting of all the school committeemen, and the boards of trustees and lay the proposed plan before them for their advice and suggestions. After receiving the advice of the committeemen and trustees, the county board of education shall have authority to adopt a county-wide plan or organization, and no districts or parts of any district, including non-local tax, local tax, and special charter districts, hereafter referred to in this article, shall be consolidated or the boundary lines changed, unless the consolidation or the change of boundary lines is in accordance with the adopted county-wide plan of organization: *Provided*, that in the event the county board of education deems it wise to modify or change the adopted plan, the board shall notify the committeemen and interested patrons and give them a hearing, if they desire to be heard, before any changes shall be made. [The meeting required to be held before the adoption of the county-wide plan shall be called, and the notification required to be given a contemplated modification or change of an adopted plan shall be given by publication once at least ten days before the meeting or the hearing in a newspaper published at the county-seat of a notice addressed to those affected thereby, giving the hour and day and place of the meeting or the hearing and the purpose thereof, and by mailing to or serving of like notices upon all committeemen and trustees.

If no newspaper be published in the county-seat, such notice shall be posted at the courthouse door and at a public place in each township in the county ten days prior to such meeting.

No adoption or amendment of such plan shall be held invalid or ineffectual because of any failure to comply with the requirement hereof as to the mailing or service of notice.]

3. The county board of education shall have authority to execute the entire plan or any part of the same, but the county board of education shall have no authority to create a debt for the execution of any part of the proposed plan, unless authorized by law, and if the amount necessary to put into operation all or any part of said plan shall be greater than the amount that may be reasonably expected from the operating and equipment fund for this purpose, the amount shall be guaranteed by the districts affected by the execution of the plan, or if the districts do not guarantee the funds the county board of education shall lay the proposed plan before the county commissioners, together with the estimated amount necessary to put the same into operation, and if the amount necessary to carry out all or any part of the proposed plan shall be approved by the county com-

missioners, the county board of education shall then have the authority to organize the districts in accordance with the county-wide plan.

4. When the proposed county-wide plan is adopted the county board shall notify the committeemen and boards of trustees as to what part of the plan the board proposes to carry out first and in what order the other parts of the plan will be considered, and the preference shall be given to those districts in which the needs are greatest if the funds for providing the equipment are made available.

5. In the event that any child or children of any district or any part of a district are without adequate school advantages, and these advantages may be improved by transferring said child or children to a school or schools in adjoining districts, the county board shall have authority to make such a transfer. But this shall not empower the county board of education to abolish or divide a district unless such act shall be in harmony with the county-wide plan or organization. The temporary transfer of such child or children may be made until such time as the county-wide plan will provide more advantageously for them. (1923, c. 136, s. 73a; 1924, c. 121, s. 2.)

**Creation of District Enjoined.**—Where it does not appear that the county-wide plan has been adopted, an order for an election which involves the creation of a new district, is in contravention of this section and a judgment injoining such election will be upheld. *Howard v. Board*, 189 N. C. 675, 127 S. E. 704, 706.

**"County Wide Plan."**—Where the "county wide plan" has been adopted there is created a "school district" to elections in which § 5639 (Vol. III, C. S.) is applicable, and not a "special school taxing district" to which § 5657 (Vol. III, C. S.) would apply. *Harrington v. Board*, 189 N. C. 572, 127 S. E. 577, 579.

## § 5483. Consolidation of schools or school districts.

**Election Cannot Relate Back to Invalid Consolidation.**—Where the consolidation of existing school districts with various rates of taxation attempted under the provisions of C. S., 5530 (§ 5646 Vol. III, C. S.) is invalid, an election thereafter held under the provisions of C. S., 5473, (§ 5483, Vol. III, C. S.) as amended by Laws 1921, ch. 179, § 1, cannot relate back and validate the consolidation and the tax to be levied and bonds to be issued thereunder. *Jones v. Board*, 187 N. C. 557, 122 S. E. 290.

**"County-Wide Plan."**—Under this section and section 5481 (Vol. II, C. S.) an order adopting the "county-wide plan," consolidating two districts and providing for the future consolidation of these with two nonlocal tax districts is valid. *Scroggs v. Board*, 189 N. C. 110, 126 S. E. 109.

**Consolidation of Tax and Nontax Districts.**—It is not necessary to the valid consolidation of nonspecial school tax districts with special school tax districts that it be approved by the voters of the nonspecial school tax districts, when the questions of taxation and bond issues are not involved, and especially so when the consolidation has been made according to the provisions of a Public-Local Law applicable to the county wherein the consolidation has been made. *Board v. Bray Bros. Co.*, 184 N. C. 484, 115 S. E. 47.

Special school-tax districts, organized and exercising governmental functions in the administration of the school laws, are quasi-public corporations subject to the constitutional provisions in restraint of contracting



debts for other than necessary purposes, except by the vote of the people of a given district, Const. Art. VII, § 7; and, semble, that where an existent tax and nontax district are thereunder consolidated, it would require the submission of the question to those living within the district thus formed, but outside of the district that has theretofore voted the tax. *Paschal v. Johnson*, 183 N. C. 129, 110 S. E. 841.

The authority given the county board of education to redistrict the entire county or part thereof, and to consolidate school districts, etc., C. S., 5473, (§ 5483, Vol. III, C. S.) was amended by Public Laws of 1921, ch. 179, providing, among other things, for such consolidation of existing districts under a uniform rate of taxation not exceeding the lowest in any one district, meets the requirements of our Constitution, Art. VII, § 7, but to the extent amendatory statute permits consolidation of local school tax districts with adjacent territory or local schools that have never voted any tax, the provisions of C. S., 5530, (§ 5646, Vol. III, C. S.) must apply so as to permit those living in such proposed new territory to vote separately upon the question of taxing themselves for the purpose. *Perry v. Commissioners*, 183 N. C. 387, 112 S. E. 6.

**Issuance of Bonds.**—Where there has been a valid consolidation of local-tax school districts, having an equal tax rate for the purpose, by proper proceedings under the statute the new district may then approve the question of an additional special tax, and where this has been done under the authority of a valid statute, and an issue of bonds properly approved by the voters, such bonds are constitutional and valid. *Paschal v. Johnson*, 183 N. C. 129, 110 S. E. 841.

### § 5487. Changing the boundary lines of the special charter districts.

Upon the written petition of the governing body of a special charter district the county board of education is authorized to change the boundary line between special charter districts and local tax districts, and to consolidate local tax districts with a special charter district. But a record shall be made of the petition in the minutes of the governing body of the special charter district, and a record shall be made in the minutes of the county board of education, stating that the petition was received and the request was granted. Then the boundary line shall be changed and the consolidation made and properly recorded, and the new boundary line shall be clearly set forth in the minutes of both boards. *Provided*, that when the tax rates are not the same, only the lower rate of tax may be levied in the whole territory. (1923, c. 136, s. 79; 1925, c. 150.)

## Subchapter VI. Teachers and Principals

### ART. 17. CERTIFICATION OF TEACHERS

### § 5578. Dates for examinations; special examinations.

The second Tuesday in April, of each year is hereby designated for said examinations, which may be continued from day to day for three successive days, under such rules and regulations as said board may adopt; but no examination shall commence on any other day than the first day of [the] period mentioned in this section, and no examination shall be held at any other time. The board may in its

discretion provide for special examinations to be conducted by such persons as it may appoint. (C. S., 5652; 1917, c. 146, s. 4; 1925, c. 180, s. 3.)

### **Subchapter VII. Revenue for the Public Schools**

#### **ART. 18. HOW TO ESTIMATE AMOUNT NECESSARY FOR SIX MONTHS' TERM**

##### **§ 5596. The contents of the May budget.**

The May budget prepared by the county board of education shall provide three separate school funds, (a) a salary fund; (b) an operating and equipment fund; and (c) a fund for the repayment of all notes, loans and bonds.

(a) The salary fund shall include the salaries of all superintendents, principals, supervisors, teachers of all sorts, the per diem of the county board of education, and the salaries of all other officials authorized by law.

(b) The operating and equipment fund shall provide for janitors, fuel, school supplies, insurance, rent, interest not otherwise provided for, traveling expenses of all school officials, transportation of pupils, all legal operating expenses, all necessary assistance to the county superintendent not provided in the salary fund, all needed repairs, sites, the erection of school buildings, including dormitories, teachers' homes, additions to buildings, [the indebtedness of local tax, special charter or special school taxing districts incurred for the erection of school building necessary for the six months' school term whenever as is authorized by law, such district indebtedness is assumed by the county as a whole] and all other equipment authorized or required by law.

(c) A fund for the repayment of all loans due the state and of all interest and installments on bonds and other evidence of indebtedness shall be provided in the budget. This shall be a separate fund and shall include all interest and installments due each year. (1923, c. 136, s. 175; 1925, c. 180, s. 5.)

##### **§ 5598. How to estimate the salary fund for the special charter or city schools.**

The salary fund for special charter districts shall be estimated as follows: The county board of education shall incorporate the budget of the special charter districts in the county budget and allow the actual salary for six months in accordance with the adopted salary schedule for each teacher permitted under section one hundred and seventy-six of this article. In all counties where the schools of a special charter district are operated as a part of the county system, and are under the control of the county board of education, and pupils living outside the special charter district are permitted, as the county board of education may direct, to attend free of all tuition



charges, the amount of the salary budget of said special charter district shall be estimated in the same way as the budget for any other district school of the county is estimated. (1923, c. 136, s. 177; 1925, c. 138, s. 1.)

**§ 5599. How to determine the amount of the operating and equipment fund.**

All poll taxes, fines, forfeitures, penalties, and all public school revenues of the county not otherwise appropriated shall be placed to the credit of the operating and equipment fund authorized in section 5596, subsection (b), except as otherwise provided.

The county board of education shall allow the same per capita amount per pupil enrolled for the previous year to the special charter district that is allowed to all other schools of the county, and the total amount for all schools of the county shall be the amount of the operating and equipment fund to be incorporated in the budget. If the amount derived or to be derived from the sources mentioned above in this section is insufficient for this fund the commissioners are authorized to levy an additional tax to meet the actual needs.

Whenever a district issues bonds or borrows from county board of education for the erection of any school building, thus relieving the county board of education in whole or in part of providing suitable building or buildings for said district for the six months school term, the county board of education is hereby directed to apportion to said district its pro rata part of the operating and equipment fund on the same basis that the county board of education apportions this fund to the special charter districts until the amount so apportioned equals the amount of the loan or bond issue paid or payable by said district. [The county board of education, with the approval of the board of commissioners, may include in the operating and equipment fund in the budget the indebtedness of all districts, including special charter districts, lawfully incurred in erecting and equipping school buildings necessary for the six months school term, and when such indebtedness is taken over for payment by the county as a whole and the local districts are relieved of their annual payments, then the county funds provided for such purpose shall be deducted from the operating and equipment fund prior to the division of this fund among the schools of the county as provided in this section.] (1923, c. 136, s. 178; 1925, c. 180, s. 6.)

**ART. 19. POWERS, DUTIES AND RESPONSIBILITIES OF THE BOARD OF COUNTY COMMISSIONERS IN PROVIDING FUNDS FOR SIX MONTHS TERM**

**§ 5608. Procedure in cases of disagreement or refusal of county commissioners to levy school taxes.**

In the event of a disagreement between the county board of education and the board of county commissioners as to the amount of

salary fund [the operating or equipment fund] or the fund necessary to pay interest and installments on bonds, notes, and loans, the county board of education and the board of county commissioners shall sit in joint session, and each board shall have one vote on the question of the adoption of these amounts in the budget. A majority of the members of each board shall cast the vote for each board. In the event of a tie, the clerk of the superior court shall act as arbitrator upon the issues arising between said two boards, and shall render his decision thereon within ten days. But either the county board of education or the board of county commissioners shall have the right to appeal to the superior court within thirty days from the date of the decision of the clerk of the superior court, and it shall be the duty of the judge hearing the case on appeal to find the facts as to the amount of the salary fund [the operating or equipment fund] and the fund necessary to pay interest and installments on bonds, notes, and loans, which findings shall be conclusive, and he shall give judgment requiring the county commissioners to levy the tax which will provide the amount of the salary fund [the operating or equipment fund] which he finds necessary to maintain the schools for six months in every school district in the county and the amount necessary to pay interest and installments on bonds, notes, and loans. Any board of county commissioners failing to obey such order and to levy the tax ordered by the court shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.

In case of an appeal to the superior court, all papers and records relating to the case shall be considered a part of the record for consideration by the court. (1923, c. 136, s. 187; 1925, c. 180, s. 4.)

**In General.**—C. S., 5488, (5608 Vol. III C. S.) prescribing the procedure in the event of disagreement between the county board of education and the county board of commissioners, as to the amount to be provided by the county for the maintenance of a six months school term, requiring the judge to hear the same and conclusively find the facts as to the amount needed, confers upon the courts duties of a judicial nature, not requiring a trial by jury to determine the disputed matter upon an issue of fact, and the provisions of this section are not void as being repugnant to Art. I, sec. 19, of the State Constitution. *Board of Education v. Board of Commissioners*, 174 N. C. 469, 93 S. E. 1001, cited and applied. *Board v. Board*, 182 N. C. 571, 109 S. E. 630.

ART. 20. THE TREASURER: HIS POWERS, DUTIES AND RESPONSIBILITIES IN DISBURSING FUNDS

**§ 5615. Treasurer shall keep special charter district and county school funds separate.**

When the total amount of county school taxes has been computed the county board of education, in mutual agreement with the respective special charter district boards of trustees, shall furnish the county treasurer with a statement showing the per cent of the total amount of county school taxes that belong to the county board of



education and the per cent that belongs to each respective special charter district board.

When this per cent basis has been determined, the county board of education shall furnish the treasurer of the county board of education with a statement showing what per cent of the total amount of school funds shall be set aside and held as a separate account in his hands to the credit of each special charter board, and what per cent shall be held to the credit of the county board of education.

Upon receipt of moneys collected for county taxes from the sheriff or other collecting officer, the county treasurer shall immediately separate the school fund, which shall include all moneys received from taxes or otherwise for all school purposes, from all county taxes on a per cent basis in accord with the statement supplied by the board of county commissioners, and on receipt given to the sheriff or other collecting officer he shall show the amount credited to the school fund.

The county treasurer shall then immediately place to the credit of the county board of education that per cent of the county school fund which belongs to the county board of education, and to each special charter district board of trustees the per cent which belongs to each respective special charter district board as determined on the basis of the statement provided him by the county board of education in mutual agreement with the respective special charter district boards of trustees in said county. He shall then notify the respective boards of amounts placed to their respective credit, and shall pay over to the treasurers of the respective boards of education said amounts on properly executed order. After the final settlement of the sheriff or other collecting officer with the board of county commissioners, as provided by law, the county treasurer shall make all needed adjustments between the school funds and other county funds, and immediately place to the credit of the respective boards of education the final amounts belonging to each respective board of education for the given fiscal year. [*Provided*, that if the county board of education and a special charter district board of trustees fail to agree as to the per cent of the total amount of school tax that belongs to the county board of education and the per cent that belongs to the special charter district board, that either board may appeal to the State Superintendent of Public Instruction, who shall determine the same and report his decision to the county treasurer.] (1923, c. 136, s. 194; 1925, c. 138, s. 2.)

### **Subchapter VIII. Local Tax Elections for Schools**

#### **ART. 23. SCHOOL DISTRICTS AUTHORIZED TO VOTE LOCAL TAXES**

#### **§ 5639. How elections may be called.**

See note to § 5981.

**In General.**—The county board of education may form new school districts by combining contiguous or adjoining special local with nonspecial existing tax district (art. 18, ch. 136, Public Laws 1923), and upon peti-

tion of the voters filed under section 219, article 7, (from which this section Vol. III, C. S. is codified) a valid election may be called by the county commissioners under the further provision of said article 18 to vote upon the question of a special tax for the district so formed under the statutory limitations as to the rate imposed, and the observance of the condition required by the statute to take care of the indebtedness already incurred by such of the special districts thus in the combination as may have theretofore voted for a special school tax within their former boundaries. The question as to special-charter school districts is not presented in this case. *Sparkman v. Board*, 187 N. C. 241, 121 S. E. 531.

Where nonspecial school-tax districts have been combined into a school-tax district with special school-tax districts, the nonspecial tax districts cannot maintain the position that it was necessary to the valid imposition of a special tax for school purposes within the district thus created, that the voters within each nonspecial tax district should approve it. Article 18, chapter 136, Public Laws 1923, otherwise providing, the Legislature having almost unlimited constitutional authority over these local agencies of government, and may at any time change and combine them, irrespective of territorial limits, by safeguarding certain restrictions imposed by the Constitution. *Sparkman v. Board*, 187 N. C. 241, 121 S. E. 531.

**Approval of Voters of Each District Unnecessary.**—Where, by proper statutory procedure, a school-tax district has been formed by a combination of existing special and nonspecial local-tax districts and accordingly the county commissioners have called an election for the approval of the voters of a special tax, such approval by a majority of the electors registered therein is valid, the election being for the new district thus formed, and the fact that one or several of the districts incorporated had voted against the proposed tax does not invalidate it. The sections of the Consolidated Statutes requiring the separate approval of the voters of the nonspecial school-tax territory have no application. *Sparkman v. Board*, 187 N. C. 241, 121 S. E. 531.

## § 5640. The board to consider petition.

The county board of education or the board of trustees, as the case may be, shall receive the petition and give it due consideration. If the board shall approve the petition for an election, it shall be endorsed by the chairman and secretary of the board and a record of the endorsement shall be made in the minutes of the board of education. The petition shall then be presented to the board of county commissioners or the governing body authorized to order the election, and it shall be the duty of the board of county commissioners or said governing body to call an election and fix the date for the same: *Provided*, the county board of education or board of trustees, as the case may be, may, for any good and sufficient reason, withdraw the petition before the close of the registration books, and if the petition be so withdrawn, the election shall not be held. In the case of a special charter district coterminous with or situated entirely within an incorporated city or town, said petition shall be presented to the governing body of said city or town, and the election shall be ordered by said governing body. (1923, c. 136, s. 220; 1925, c. 143.)

**Mandamus—Duty of Board Discretionary.**—Since the duty of the board of commissioners, under this section of Vol. III, C. S. is the same in case of the second election, as in the first instance, it is only ministerial, and not discretionary and judicial. Therefore, mandamus is the appropriate



remedy to enforce the performance of this ministerial, nondiscretionary duty. *Board v. Board*, 189 N. C. 650, 127 S. E. 692, 693.

**The duty of the board of education** under this section in connection with § 5645 Vol. III, C. S. is discretionary and can not be enforced by mandamus. *Board v. Board*, 189 N. C. 650, 127 S. E. 692.

**Same—Duty of Commissioners Ministerial.**—This section does not rest in the county commissioners discretion to order or not order an election. After the board of education has approved the petition, the duty of the commissioners is ministerial only and may be enforced by mandamus. *Board v. Board*, 189 N. C. 650, 127 S. E. 692.

### § 5641. Rules governing election for local taxes.

**Newspaper Notice Required.**—See note to § 5640.

### § 5645. Frequency of election.

**Nature of Section.**—C. S. Supp. 1924, § 5645, is an enabling statute, by which the interested citizens, pursuant to and in compliance with C. S. Supp. 1924, § 5639, may after the lapse of six months, seek another election. *Board v. Board*, 189 N. C. 650, 127 S. E. 692, 693.

**"May,"** in C. S. Supp. 1924, § 5645, enables, permits, and does not require, the "citizens of any duly created school district" to start again the machinery provided by which they can have another opportunity to vote on the question of a local tax for schools in the given district. *Board v. Board*, 189 N. C. 650, 127 S. E. 692, 693.

### § 5646. Enlargement of local tax or special charter districts.

Upon a written petition of a majority of the governing board of any district, the county board of education, after approving the petition, shall present the same to the board of county commissioners and ask for an election on the question of the enlargement of the boundary lines of any such district so as to include any contiguous territory, and an election in such new territory may be ordered and held under rules governing elections for local taxes as provided in this article: *Provided*, the local tax rate specified in the petition and submitted to the qualified voters shall be a local tax of the same rate as that voted in the said district to which the territory is to be added. If a majority of the qualified voters in such new territory shall vote in favor of such tax, the new territory shall become a part of said district, and the term "local tax of the same rate" herein used shall include, in addition to the usual local tax, any tax levied to meet the interest and sinking fund of any bonds heretofore issued by the district proposed to be enlarged [or by any part of the new territory]. In case a majority of the qualified voters at the election shall vote in favor of the tax, the district shall be deemed enlarged as so proposed. (C. S. 5530, revised; 1923, c. 136, s. 226; 1925, c. 151.)

**Editor's Note.**—The cases which follow in this note are in the majority of instances constructions of section 5530 of the Consolidated Statutes, which of course did not include the amendment of 1923. As the Act of 1923, codified in Vol. III, Consolidated Statutes as section 5646 varies no little from the original statute, it is deemed advisable to advert to the changes here, so that the constructions of the former statute may be more readily understood.

**In General.**—Laws of 1921, ch. 179, providing for the consolidation and adjustment of rates of taxation and authorizing the voters of a district so consolidated to vote special tax rates for the schools in the entire district, etc., should be construed to harmonize with C. S., 5530, (5646 Vol. III, C. S.) and the provisions of the former statute do not affect or impair the requirement of the latter one, that for an extension of the boundaries of an existing local school tax district or districts, the approval of the tax proposed must first be given by the voters in the proposed new and contiguous territory. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1.

**Construed with Art 24.**—C. S., 5526, (now incorporated in Art 24, ch. 95, Vol. III, C. S.), providing for the creation of new local school tax districts, and section 5530 (5646 Vol. III, C. S.), requiring the question of an enlargement of an existing special school tax district to be submitted separately to the voters of the proposed new territory are to be construed in *pari materia*, and the provisions of each are held reconcilable with those of the other. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1.

C. S., 5526 (incorporated in Art. 24, Vol. III, C. S.), applies primarily to the consolidation of nonspecial-school-tax territory; and in order to consolidate existent school-tax districts having different rates, by extending the limits of some of them to include others, section 5530 (5646 Vol. III, C. S.) requires that a majority of the committee or trustees of either of these districts sought to be enlarged file a written request with the county board of education to thus enlarge its boundaries, and an election must be held before consolidation, and the other material requirements of the statute complied with; and where this course has not been followed, the tax attempted to be levied in the consolidated district, and bonds ordered to be issued in pursuance thereof, are invalid. *Jones v. Board*, 187 N. C. 557, 122 S. E. 290. Attention is directed to the fact that the majority now required is not of the "committee or trustees" but of the "governing board." In other respects this decision seems to be still applicable. *Ed. Note.*

C. S., 5526 (incorporated in Art. 24, Vol. III, C. S.), providing for the creation of a special school tax district by the county board of education without regard to township lines, upon an election to be held within the proposed district, after notice, etc., refers to territory having no special school tax and has no application to the enlargement of such district under the provisions of C. S., 5530 (5646, Vol. III, C. S.), wherein one or more school tax districts having already been established and there is other contiguous territory sought to be included which has not voted any special school tax. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1.

Where special school tax districts have been consolidated with non-school tax territory, it is, in effect, an enlargement of the special tax territory, and coming within the provisions of C. S., 5530, (5646, Vol. III, C. S.) it is required for the validity of a special tax to be levied for school purposes in the enlarged territory that it be approved by the voters outside of the special tax district, or districts included in the consolidated territory, at an election to be held according to law. *Barnes v. Board*, 184 N. C. 325, 114 S. E. 398.

Where special school tax districts and nonspecial school tax districts have been consolidated, and the district as a whole has voted, but separately as to each district, approving the question of special taxation for school purposes, and the election as to each, inclusive of the nontax territory, is upheld, counting the votes separately therein, the result of the election will be declared valid. *Board v. Bray Bros. Co.*, 184 N. C. 484, 115 S. E. 47.

**Collateral Attack on Special Tax.**—Where nonspecial school tax territory is included in a consolidated school tax district with a school tax district that has theretofore voted and continued to levy a special tax, the question of the validity of the tax so levied by the existing district cannot be attacked collaterally in a suit to enjoin the levy of a special tax on



the entire consolidated district, later attempted to be formed. *Barnes v. Board*, 184 N. C. 325, 114 S. E. 398.

**Same—Separate Vote in Nontax Territory.** — Where one or more special tax districts have been established under the provisions of our statutes applicable, such districts may not extend their territory to include other districts and adjacent territory that have not voted a special tax, without the question having first been submitted to and approved separately by the voters of the outlying territory, and giving them the right to independently determine for themselves whether they shall be specially taxed, in the amount proposed. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1.

In *Plott v. Board*, 187 N. C. 125, 132, 121 S. E. 190, the Court said: "The Court has decided, it is true, that where a school-taxing district has been established its boundaries may not be enlarged or extended so as to include an adjacent nontaxing district without the approval of a majority of the qualified voters of the nontaxing territory."

The uniting of an existing special school tax district with other districts not having such tax is in effect the enlarging of the boundaries of the tax district to take in outlying nontax territory under the provisions of C. S., 5530 (5646, Vol. III, C. S.); and it is only required for the establishment of the enlarged district and the levying of a special tax therein, that the district to be enlarged and the outlying territory, should each cast a majority vote in favor of the propositions submitted to them, and it is unnecessary that each of the nontax districts included in the enlarged territory should have separately cast a majority vote in favor of the special tax proposed, nor is it material that one of them was separated from the others by the original special tax district so enlarged. *Vann v. Board*, 185 N. C. 168, 116 S. E. 421.

The authority given the county board of education to redistrict the entire county or part thereof, and to consolidate school districts, etc., C. S., 5473, (section 5483, Vol. III, C. S.) as amended by Public Laws of 1921, ch. 179, providing, among other things, for such consolidation of existing districts under a uniform rate of taxation not exceeding the lowest in any one district, meets the requirements of our Constitution, Art. VII, sec. 7, but to the extent the amendatory statute permits consolidation of local school tax districts with adjacent territory or local schools that have never voted any tax, the provisions of C. S., 5530 (section 5646, Vol. III, C. S.), must apply so as to permit those living in such proposed new territory to vote separately upon the question of taxing themselves for the purpose. *Perry v. Commissioners*, 183 N. C. 387, 112 S. E. 6.

In proceedings to establish a special school tax district under the provisions of C. S., 5526 (incorporated in Article 24 ch. 95, Vol. III, C. S.), it appeared that therein was included several local tax districts already established and also territory wherein no special tax had been voted, and the proceedings were properly instituted by only one of these local school tax districts: Held, the proceedings were for the enlargement of the petitioning local tax district, and required that the others therein should also have proceeded regularly under the statute and that the electors in the proposed part that had not voted a special tax be permitted to vote separately upon the question of the contemplated increase for the designated purpose. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1.

The combination or consolidation of local school tax districts with territory that has not voted a special tax for the purposes of schools must fall within the provisions of C. S., 5530, (§ 5646, Vol. III, C. S.) whereby the proposed new territory is required to vote separately upon the question of taxation, in conformity with our Constitution, Art. VII, § 7, *Perry v. Commissioners*, 183 N. C. 387, 112 S. E. 6.

**Enlarging Special Charter District.**—While special charter school districts do not as a rule come within the compulsory regulations of the public school authorities unless or until they have surrendered their special

charter, chapter 136, Laws of 1923, § 157, the school authorities, under section 226, (from which this section in Vol. III, C. S. is codified) are empowered to enlarge one of these districts having a special tax, by adding outside adjoining territory so that it comes under the governing authorities of the special charter district thus enlarged, when the approval of the voters of the outlying territory proposed to be added have approved thereof at an election held for the purpose as directed by the statute. *Blue v. Board*, 187 N. C. 431, 122 S. E. 19.

### § 5646 (a). Countywide plan not necessary.

It shall not be necessary, in enlarging school districts under section five thousand six hundred and forty-six (5646) of article twenty-three, chapter education, of volume three, Consolidated Statutes, or under section five thousand six hundred and fifty thereof, for county boards of education to adopt a countywide plan of organization, under the provisions of said chapter. (1925, c. 151, s. 2.)

### § 5647. Abolition of district upon election.

**In General.**—Under the provisions of C. S., 5530, (5646, Vol. III, C. S.) a local tax school district may be abolished by the act of creating a new one of which it is a component part, while section 5531 (5647 Vol. III, C. S.) is restricted simply and singly to the abolition of an existing district, and so construed, it was held that these sections are in harmony with each other. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1.

**Abolition Unnecessary to Valid Consolidation.**—Where, in accordance with the provisions of chapter 136, Laws of 1923, an existent special charter tax district has been enlarged to take in added and adjoining territory, it is not required that such district should have first been abolished to make the consolidation valid according to sections 227, 228, (5647, 5648, Vol. III, C. S.) the requirements of these sections being intended to provide for the abolition of local-tax districts when that was the single question presented. *Blue v. Board*, 187 N. C. 431, 122 S. E. 19.

### § 5649. Election for abolition not oftener than once a year.

**In General.**—This section requiring that “no election for revoking a special [now local] tax in any special [now local] tax district shall be ordered and held,” within less than two [now one] years from the date at which the tax was voted and the district established, “nor at any time within less than two [now one] years after the date of the last election on the question [of revoking the tax] in the district,” invalidates any election on the question of taxation held within two years [now one] after the last election, the second proposition being independent from the first as to “revoking” a special tax in the district, otherwise the second provision would be identical with the first, and meaningless. *Weesner v. Davidson County*, 182 N. C. 604, 190 S. E. 863. The insertion in brackets by the editor indicates the changes in this section effected by the Acts of 1923. Ed. Note.

**Computing the Time.**—Computing the two [now one] years period in which an election may be had with regard to taxation in a special school district under the provisions of this section, the time should be computed from the last valid election on the subject. *Weesner v. Davidson County*, 182 N. C. 604, 190 S. E. 863.  
Art. 24 Supp.

See notes to §§ 5481, 5646.

**Editor's Note.**—As section 5526 of Volume II Consolidation Statutes was



codified in no one section of Vol. III of the Consolidated Statutes, but is found scattered throughout the sections comprising article 24 of that volume, it was thought the beginning of that article was the most appropriate place for constructions of the former section.

**Applicability to Existing Tax Districts.**—The application of the provisions of C. S., 5526, [incorporated throughout the various sections of this article in Vol. III, C. S.] to the formation of new local school tax districts without regard to township lines, etc., refers primarily to instances where new districts are created or formed, as therein prescribed, out of territory exclusive of special tax districts, or out of territory having the same status throughout its entirety, in relation to the then existing school tax or taxes, so as to give every voter a fair chance, uninfluenced by other considerations, to declare with his ballot whether or not he wishes to be taxed for the creation and maintenance of the district proposed. *Perry v. Commissioners*, 183 N. C. 387, 112 S. E. 6.

C. S., 5526, providing for the creation of a special school tax district by the county board of education without regard to township lines, upon an election to be held within the proposed district, after notice, etc., refers to territory having no special school tax and has no application to the enlargement of such district under the provisions of § 5530, 5646 Vol. III, C. S. wherein one or more school tax districts have already been established and there is other contiguous territory sought to be included which has not voted any special school tax. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1.

C. S., 5526, applies primarily to the consolidation of nonspecial-school-tax territory; and in order to consolidate existent school-tax districts having different rates, by extending the limits of some of them to include others, section 5530, 5646 Vol. III, C. S. requires that a majority of the committee or trustees of either of these districts sought to be enlarged file a written request with the county board of education to thus enlarge its boundaries, and an election must be held before consolidation, and the other material requirements of the statute complied with; and where this course has not been followed, the tax attempted to be levied in the consolidated district, and bonds ordered to be issued in pursuance thereof, are invalid. *Jones v. Board*, 187 N. C. 557, 122 S. E. 290.

C. S., Supp. 1924, § 5657, relates to "special school taxing districts," and not to "school districts." Special school taxing districts are created by C. S. Supp. 1924, § 5655; they include territory within more than one school district. Hence we find the legislative requirement in C. S. Supp. 1924, § 5657, that "the governing school boards of at least a majority of the school districts within the special school taxing district shall indorse the petition." *Harrington v. Board*, 189 N. C. 572, 127 S. E. 577.

**Separate Vote in Nontax Territory.**—In proceedings to establish a special school tax district under the provisions of C. S., 5526, it appeared that therein were included several local tax districts already established and also territory wherein no special tax had been voted, and the proceedings were properly instituted by only one of these local school tax districts, it was held that the proceedings were for the enlargement of the petitioning local tax district, and required that the others therein should also have proceeded regularly under the statute and that the electors in the proposed part that had not voted a special tax be permitted to vote separately upon the question of the contemplated increase for the designated purpose. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1. *Riddle v. Cumberland*, 180 N. C. 321, 104 S. E. 662, distinguished.

C. S., 5526, providing for the creation of new local school tax districts, and section 5530, (5646 Vol. III, C. S.) requiring the question of an enlargement of an existing special tax district to be submitted separately to the voters of the proposed new territory are to be construed in *pari materia*, and the provisions of each are held reconcilable with those of the other. *Hicks v. Board*, 183 N. C. 394, 112 S. E. 1.

Where school-tax districts already exist within the territory embraced by a proposed new district to be created for the entire township under this article the majority vote of the proposed new district will control the result of the election fairly and freely held, and the contention that a separate election should have been held in the territory not embraced in the old districts is without merit. *Riddle v. Cumberland*, 180 N. C. 321, 104 S. E. 662.

**Restriction as to Locating School Invalid.**—Where the electors of a school district of a county have voted for a special tax for the erection of a public school building, based upon a petition filed with the county commissioners, and approved by the county board of education in conformity with the requirements of C. S., sec. 5526, except that the petition attempted to take away the discretionary power of the commissioners in locating it, this restrictive provision in the petition is contrary to law, and will be disregarded, and the election being free from fraud and giving the electors full opportunity to vote, the special tax thereby approved will be held valid. *Lazenby v. Board*, 186 N. C. 548, 120 S. E. 214.

**Form of Ballot Directory.**—Under a statute which sets out a form of ballot to be used at an election, the use of such form is directory and not mandatory, unless the statute so declares, this matter being within the discretionary power of the Legislature. *Riddle v. Cumberland*, 180 N. C. 321, 104 S. E. 662.

The failure to use forms prescribed by this section will not render the election invalid when a free and fair opportunity has been afforded the voters therein to express their will at the polls. *Riddle v. Cumberland*, 180 N. C. 321, 104 S. E. 662.

### § 5650. Enlarging boundaries of district within incorporated city or town.

The boundaries of a district situated entirely within the corporate limits of a city or town, but not coterminous with such city or town, may be enlarged so as to make the district coterminous with such city or town either in the manner prescribed by this section or in the manner prescribed by section five thousand six hundred and forty-six: *Provided, however*, that no district shall be enlarged under this section if the new territory necessary to be added to such district, in order to make it coterminus with such city or town, has any bonded debt incurred for school purposes, other than debt payable by taxation of all taxable property in such district and such new territory. In cases where the local annual tax voted to supplement the funds of the six months public school term is of the same rate in such district and in the new territory necessary to be added to such district in order to make the district coterminous with such city or town, the county board of education shall have power to enlarge the boundaries of the district as aforesaid. In cases where such tax rates are not the same, the boundaries of the district shall become so enlarged upon the adoption of a proposition for such enlargement by a majority of the qualified voters of such new territory. The governing body of such city or town may at any time, upon petition of the board of education or other governing body of such district, or upon its own initiative if the governing body of the city or town is also the governing body of the district, submit the question of enlarging the district as aforesaid to the qualified voters of such new territory proposed to be added to such district at any general or



municipal election or at a special election called for said purpose. Such an election may be ordered and held and a new registration for said election provided under the rules governing elections for local taxes as provided under the article, except that the election and registration shall be ordered by and held under the supervision of and the result of the election determined by the governing body of such city or town. The ballots to be used in said election shall have printed or written thereon the words: "For the enlargement of . . . . . school district, pursuant to section two hundred and thirty of chapter one hundred and thirty-six of the Public Laws of one thousand nine hundred and twenty-three, as amended," and "Against the enlargement of . . . . . school district, pursuant to section two hundred and thirty of chapter one hundred and thirty-six of the Public Laws of one thousand nine hundred and twenty-three, as amended." If a majority of the qualified voters of such new territory proposed to be added to such district shall vote in favor of such enlargement, said district shall thereupon become coterminous with said city or town, and there shall be levied annually in such new territory all taxes previously voted in said district for the purpose of supplementing the funds for the six months public school terms for said district and for the purpose of paying the principal or interest of any bonds or other indebtedness previously issued or incurred by said district; and a vote in favor of such enlargement shall be deemed and held to be a vote in favor of the levying of such taxes. The validity of the said election and of the registration for said election and of the correctness of the determination of the result of said election shall not be open to question except in an action or proceeding commenced within thirty days after the determination of the result of said election. At the same time that said election is held it shall be lawful to hold an election in the entire territory of said city or town on the question of issuing bonds of said city or town or of said school district as so enlarged, for school purposes, and levying a sufficient tax for the payment of said bonds, or on the question of levying a local annual tax on all taxable property in said city or town or in said school district as so enlarged, to supplement the funds for the six months public school term for said district, in addition to taxes for the payment of bonds, in the same manner that would be lawful if said district had been so enlarged prior to the submission of said questions. One registration may be provided for all of said simultaneous elections. (1923, c. 136, s. 230; 1925, c. 143.)

**§ 5651. Local tax districts from portions of contiguous counties.**

a. Local tax districts may be formed as provided in this section out of contiguous portions of two or more counties.

The petition for such a district must be initiated as petitions for local tax elections are initiated under the provisions of this article, must be endorsed by the county boards of education of such contiguous counties and each county board of education shall certify

to the board of county commissioners of its county that the metes and bounds of the proposed joint local tax district are in accordance with and are an integral part of the lawfully adopted county-wide plan of organization in so far as they pertain to said county.

The board of commissioners of each county, in compliance with the provisions of this article relating to the conduct of local tax elections, shall then call and hold an election in that portion of the proposed district lying in its county. Election returns shall be made from each portion of the proposed district to the board of commissioners ordering the election in that portion and the returns canvassed and recorded as required in this article for local tax districts.

b. In case the election carries in each portion of the proposed district, the several county boards of education concerned shall each pass a formal order consolidating the territory into one joint local tax district; which shall be and become a body corporate by the name and style of '..... Joint Local Tax School District of ..... Counties.' The county board of education having the largest school census and the largest area in the part of the joint local tax districts lying in its county shall determine the location of the schoolhouse; but if the largest census and area do not both lie in the same county, then the county boards shall jointly select the site for the building, and in case of a disagreement they shall submit the question to the board of arbitration, consisting of three members, one member to be named by each board of education if three counties are concerned, or if there are but two counties, then each board shall choose one member and the two so named shall select a third member. The decision of the board of arbitration shall be binding upon all county boards of education concerned.

c. The school committee shall consist of five members, three of whom shall be appointed by the board of education of the county in which the building is to be situated and two to be appointed by the other county or counties, but the terms of office shall be so arranged that not more than two members will retire in any one year. The committee shall officially exercise such corporate powers as are conferred in this section. This said committee shall have all the powers and duties of committee of local tax districts, and in addition thereto it shall adopt a corporate seal and have the power to sue and be sued. The committee shall have the power to determine the rate of local taxes to be levied in said joint district, not exceeding the rate authorized by the voters of the district, and when the committee shall have so determined the rate of local taxes to be levied in said joint district and shall have certified same to the boards of commissioners of the several counties from which said joint district is created, the said boards of county commissioners, and each of them, shall levy said rate of local taxes within the portion of said joint district lying within their respective counties; and the taxes so levied shall be collected in the several counties as other taxes are collected therein, and shall be paid over by the officers collecting the same to



the treasurer or other fiscal agent of the county in which the school-house is located, or is to be located, to be by him placed to the credit of the joint district.

d. The committee shall have as full authority to call and hold elections for the voting of bonds of the district as is conferred upon boards of education and boards of commissioners in article twenty-two of this chapter. In calling the election for a bond issue no petition of the county board of education shall be necessary; but the election shall be called and held by the school committee of the incorporated local tax school district under as ample authority as is conferred upon both county boards of education and boards of commissioners under article twenty-two of this chapter. When bonds of the district have been voted under authority of this section, they shall be issued subject to the limitations of article twenty-two of this chapter in the corporate name of the district, signed by the chairman and secretary of the school committee, sold by the school committee, and the proceeds thereof deposited with the treasurer of the county board of education of the county in which the school building is, or is to be, located, to be placed to the credit of the joint district, and the taxes for interest and principal shall be levied and collected as provided in subsection c above for the levy and collection of local taxes.

e. The committee shall have the same power to call and hold elections to ascertain the will of the voters of the district upon the question of increasing the local tax levy to a maximum rate of fifty cents on the one hundred dollars (\$100) valuation of taxable property as it has in the case of bond elections. But local tax elections called and held in such joint districts shall be held under the general provisions of this article governing local tax elections, except that the district committee is hereby granted the powers of county boards of education and boards of commissioners as to local tax elections.

f. The building of all schoolhouses in such joint local tax districts shall be effected by the county board of education of the county in which the building is to be located under authority of law governing the erection of school buildings by county boards of education. It shall be lawful for the boards of education in the other county or counties to contribute to the cost of the building in proportion to the number of children shown by the official census to be resident within that part of the joint district lying within each county respectively. If the building is to be erected from moneys borrowed from the State Building Funds or from county taxation, then each county board of education shall contribute to its construction in the proportion set out above and pay over its contribution to the treasurer of the county board having control of the erection of the building: *Provided*, it shall be lawful for the county board that controls the erection of the building to borrow from the State and lend to the district the full amount of the cost of the building in cases where the entire amount is to be repaid by the district from district funds.

g. All district funds of a joint local tax district shall be kept dis-

tinct from all other funds, placed to the credit of the district, and expended as other local tax or district bonds funds are lawfully disbursed.

h. The county board of education and county superintendent of public instruction of the county in which the schoolhouse is located shall have as full and ample control over the joint school and the district as it has in the case of other local tax districts subject only to the limitations of this section.

i. It shall be the duty of the committee of the joint school district to prepare a budget in accordance with the law requiring budgets of special charter districts. The said budget, which shall show the proportionate part of the cost of maintenance for six months to be contributed by each county, the several parts to be ascertained on the basis of the proportions of the total district school census living in each respective county, shall be filed by the committee with the county board of education of each county, and it shall be the duty of each board, if it approves the district budget, to incorporate it in the county budget to be submitted to the commissioners in May of each year. Each of the several county boards of education is hereby directed to pay over its proportionate part of the district budget, when and as collected, to the treasurer of the board of education of the county in which the school plant is located for the purposes for which it has been levied and collected.

j. All districts formed before the ratification of this amendment under the provisions of section two hundred and thirty-two, chapter one hundred and thirty-six, Public Laws of one thousand nine hundred and twenty-three, and all districts incorporated before the ratification of this amendment, under the provisions of section two hundred and thirty-three of said chapter, are hereby authorized and empowered to exercise all the powers and privileges conferred by this section as amended. (1923, c. 136, s. 232; 1924, c. 32.)

#### ART. 26. SPECIAL COUNTY TAX IN WHICH PART OF LOCAL TAXES MAY BE RETAINED

##### **§ 5666. The rate in local tax or special charter districts.**

Whenever the maximum special county tax rate levied or to be levied under the provisions of this article is less than fifty cents (50c), each local tax, special charter or special school taxing district shall have the authority to levy an additional rate, not in excess of the local tax rate voted in the district.

All indebtedness, bonded or otherwise, of said district or districts may be assumed by the county board of education; and such indebtedness, if assumed by the county board of education, shall be paid out of the special county tax levied under the provisions of this article. (1923, c. 136, s. 245; 1925, c. 180, s. 2.)



### **Subchapter IX. Bonds and Loans for Building Schoolhouses**

#### **ART. 27. AUTHORITY TO ISSUE BONDS IN ANY COUNTY, SCHOOL DISTRICT OR SPECIAL TAXING DISTRICTS**

##### **§ 5669. Elections; how called.**

Whenever the county board of education shall so petition, the board of county commissioners of any county shall order a special election to be held in any county or special school taxing district, or in any local tax district within which a union school is maintained, for the purpose of voting upon the question of issuing bonds and levying a sufficient tax for the payment thereof for the purpose of acquiring, erecting, enlarging, altering and equipping school buildings and purchasing sites in such county or district, or for any one or more of said purposes. Said election shall be called and held under the same rules and regulations as provided in subchapter VIII for "Local Tax Elections for Schools." The ballots to be used in said election shall have written or printed thereon the words "For the issuance of \$. . . . . school bonds and the levying of a tax for the payment thereof," and "Against issuance of \$. . . . . school bonds and the levying of a tax for the payment thereof." [The notice of election shall set forth the boundaries of the district, unless the district is coterminous with a county, city, town, or township, or is coterminous with a county or township except that it does not include a city, town, or township, in such county or township, and the notice shall set forth either the amount or the maximum amount of bonds proposed to be issued.] (1923, c. 136, s. 257; 1924, c. 121, s. 3.)

**Local Law Prevails Over General Law.**—Where the provisions of a special statute, authorizing the consolidation of school districts within the county, have been complied with, objection to the validity of the issue on the ground that the order for the election was too indefinite as to specifying the amount of interest to be paid thereon under the requirement of our general statutes, C. S., 5676 [5669 Vol. III, C. S.] et seq., is untenable for both the local and the general law having been passed at the same session of the Legislature, and being in force at the same time, the local law will prevail as an exception to the general law. *Wilson v. Board*, 183 N. C. 638, 112 S. E. 418.

**When Act of 1923 Took Effect.**—Township bonds for public school purposes, authorized at an election held 9 May, 1923, under the provisions of C. S., ch. 95, are not invalid, when otherwise regular, on the ground that this section of the Consolidated Statutes was superseded by the prior enactment of chapter 136, Public Laws of 1923, there having been a substantial compliance with the requirements of the statutes on the subject. *Board v. McNear & Co.*, 186 N. C. 352, 119 S. E. 483.

##### **§ 5675. Bonds in special charter districts.**

Elections may be held in special charter districts and bonds issued and taxes levied to pay the same in the manner provided by the previous sections of this article, except as otherwise provided in this section.

(a) In the case of every special charter district coterminous with an incorporated city or town having authority by virtue of its charter, or other special or local laws, to maintain a system of schools, the petition for the election shall be made to the principal governing body of each city or town by the board of trustees, unless said board is the principal governing body of said city or town, in which case no petition shall be necessary. But said principal governing body may, in its discretion, grant or refuse said petition. In every special charter district of the kind described in this subsection, all powers and duties conferred or imposed by this article on boards of county commissioners shall be exercised and performed by the principal governing body of said city or town with which the district is coterminous, and the bonds shall be issued in the corporate name of each city or town, [and said bonds shall be sold by the principal governing body of such city or town, and signed and sealed as may be directed by the principal governing body, and the proceeds derived from the sale of such bonds shall be turned over to the custodian of funds of such special charter district, who shall receive no commission for handling of such proceeds].

(b) In the case of all special charter districts not described in subsection (a) of this section the petition for the election shall be made by the board of trustees to the board of county commissioners, which board shall call, hold, and determine the result of the election, as provided in this article, and the bonds shall be sold and issued by the board of trustees in the name of the district, and shall be signed and sealed as may be provided by said board of trustees, and the proceeds derived from the sale of such bonds shall be turned over to the custodian of funds of such special charter district, who shall receive no commission for the handling of such proceeds: *Provided, however,* that in districts of the kind described in this subsection, in which special school taxes are now levied by the principal governing body of a city or town situated within the district, the powers and duties conferred by this article on boards of county commissioners shall be exercised and performed by said principal governing body: *Provided further,* that in districts of the kind described in the subsection which lie in two or more counties, no petition shall be necessary, and the board of trustees of the district shall call, hold, and determine the result of the election. (1923, c. 136, s. 263; 1924, c. 121.)

### § 5676. Limit of bonds.

**Excess Bonds.**—In a suit by the commissioners of a school district within a county under the provisions of C. S., 5681, [5670 Vol. III, C. S.] to compel the county commissioners to deliver to it certain school bonds for negotiation that the voters of the district had approved at an election held according to the statutory provisions affecting them, it appeared that the issue was in the sum of \$75,000, or \$50,000 in excess of the amount authorized by C. S., 5678, [5676 Vol. III, C. S.] and that the original act had not been passed in accordance with the requirement of our Constitution, Art. II, sec. 14, but was later ratified by the Legislature in conformity there-



with. There being no intervening vested rights: Held, the former infirmity of the bonds was cured by the later act, and a judgment in favor of the plaintiffs was a proper one. *Board v. Board*, 183 N. C. 300, 111 S. E. 531.

ART. 28. COUNTY COMMISSIONERS DIRECTED TO FUND SCHOOL  
INDEBTEDNESS

§ 5682. Validating loans.

**Editor's Note.**—For local acts, see 1924, c. 120; 1925, cc. 34, 36, 146, 153, 161, 268.

ART. 30A. ADDITIONAL SPECIAL BUILDING FUND

§ 5694 (a). Additional building fund.

For the purpose of providing "a special building fund," to be loaned to the county boards of education for maintaining a six months school term, the Treasurer is authorized and directed to issue bonds of the State of North Carolina, payable in the manner and on the date hereinafter described, to an amount not to exceed five million dollars (\$5,000,000). All of said bonds shall bear interest at a rate not to exceed four and one-half ( $4\frac{1}{2}$ ) per cent per annum, payable semiannually on the first days of January and July of each year, and the said bonds shall bear date as of the first day of January of each and every year in which they may be issued, under the provisions of this article.

(a) *Special building fund for a separate fund.* The proceeds from the sale of these bonds shall be a separate fund in the hands of the State Treasurer and shall be kept distinct from all other funds of the State. The funds shall be paid out upon the warrant of the State Auditor, but no warrant shall be issued by the Auditor except upon the requisition of the State Superintendent of Public Instruction, with the approval and at the direction of the State Board of Education. The bank or banks in which any money belonging to this fund is deposited by the State Treasurer shall be required to pay interest on monthly balances on said money at the rate of three per cent per annum, and all such money so collected shall be credited monthly by the State Treasurer to this fund.

(b) *State Board of Education authorized to make loans.* The State Board of Education, under such rules and regulations as it may deem advisable, not inconsistent with the provisions of this chapter, may make loans from "The Special Building Fund" to the county board of education of any county for building, equipping and repairing public school buildings, dormitories, teacherages, and for the purchase of suitable sites: *Provided*, that no loan shall be made from this fund until the application for said loan has been made by the county board of education and approved by the county commissioners, nor until said commissioners shall certify that the loan is necessary to maintain a six months school term: *Provided further*, that no loan shall be made from this fund for erecting or repairing any

school building containing less than seven rooms, nor shall any building be erected in whole or in part from funds borrowed from the State unless the plans for said building shall have been approved by the State Superintendent of Public Instruction.

(c) The first four installments paid back to the State by the counties, as contemplated in this section, are hereby declared to be a part of the special building fund and may, in the discretion of the State Board of Education, be loaned to the counties on the same terms and in accordance with the same rules as provided for an original loan. (1925, c. 201, s. 1.)

### **§ 5694 (b). Manner of repayment.**

Loans to county boards of education made under the provisions of this article shall be payable in twenty equal installments, shall bear interest payable annually in advance at the same rate that the State had to pay on the bonds issued under this act for securing "The Special Building Fund," and said loans shall be evidenced by the note or notes of the county board of education, executed by the chairman and secretary thereof, and deposited with the State Treasurer. The first installment of such loan, together with the interest on the balance of the principal remaining unpaid, shall be paid by the county board of education on or before the fifteenth day of December subsequent to the making of such loan, and the remaining installments, together with the interest, shall be paid, one each year, on the fifteenth day of December of each subsequent year until all shall have been paid: *Provided*, if at the end of any five-year period it shall appear the earnings of said fund are more than sufficient to retire said bonds the State board may direct the State Treasurer to transfer such surplus to the State literary fund, and after all bonds are retired any balance remaining shall be turned over to the State literary fund. (1925, c. 201, s. 2.)

### **§ 5694 (c). Provision in May budget.**

The county board of education shall provide in its May budget for a special tax, to be styled "A Special Building Fund Tax," sufficient to repay the annual installment, together with the interest due, and shall issue its order upon the treasurer of the county school fund therefor, who, prior to the fifteenth day of December, shall pay over to the State Treasurer the amount then due. Any amount loaned under the provisions of this article shall be a lien upon the total school fund of such county, in whatsoever hands such funds may be; and if the board of county commissioners fail to provide for a sufficient tax for the fund for the repayment of notes, loans and bonds to pay the loans and interest when due, so long as any part of said loan and the interest are due, the board of county commissioners shall borrow the money in order that the six months school term may be maintained in accordance with the Constitution. Upon failure of any county to pay any installment or interest, or part of either, when due, the State Treasurer may deduct a sufficient amount



for the payment of the same out of any fund due such county from any special State appropriation for public schools, and if the amount necessary to conduct a six months school term has been decreased thereby, thus making it impossible to provide the funds for a six months term in every district in said county in accordance with law and the Constitution, the county commissioners shall borrow the amount necessary to meet the deficit caused thereby.

The State Treasurer may bring action against the county board of education of such county, or against any person in whose possession may be any part of the school funds of the county, or against the tax collector of such county; and if the amount of school fund then on hand be insufficient to pay in full the sum so due, then the State Treasurer shall be entitled to an order directing the tax collector of such county to pay over to the State Treasurer all moneys collected for school purposes until such debt and interest shall have been paid: *Provided*, this lien shall not lie against taxes collected to pay interest and principal on bonds issued by the authorities of any county or any district. (1925, c. 201, s. 3.)

**§ 5694 (d). State board of education shall approve all applications and provide funds.**

The State Board of Education shall approve all applications for loans and the amount to be loaned to each county. When said board has received and approved applications for loans in an amount of not less than five hundred thousand dollars (\$500,000), the State Board of Education shall direct the State Treasurer to sell, and he shall sell, in accordance with the provisions of this article, North Carolina bonds to provide funds for making the loans in accordance with the applications approved: *Provided*, that whenever applications are received and approved, in accordance with the provisions of this article, if the State Board of Education shall deem it unwise to sell bonds at that time, the State Treasurer, by and with the consent of the Governor and the Council of State, is hereby authorized to borrow money at the lowest rate of interest obtainable, in anticipation of the sale of the bonds herein authorized, and for the purposes for which said bonds are authorized. The State Treasurer shall execute and issue notes of the State for the money so borrowed, and he is hereby authorized to renew any such notes from time to time by issuing new notes. The rate of interest, the date of payment of said notes or renewals, and all matters and details in connection with the issuance and sale thereof shall be fixed and determined by the Governor and Council of State. Such notes when issued shall be entitled to all privileges, immunities and exemptions that the bonds authorized to be issued are entitled to. The full faith, credit and taxing power of the State are hereby pledged for the payment of such notes as may be issued, and interest thereon. The proceeds received from said notes shall be used for making loans to county boards of education in accordance with this article. The notes issued in anticipation of the sale of bonds shall be paid with

the funds derived from the sale of said bonds whenever said bonds are sold. (1925, c. 201, s. 4.)

### **§ 5694 (e). Treasurer to sell bonds.**

The bonds authorized and directed to be issued by the preceding sections shall be coupon bonds of the denomination of five hundred dollars (\$500) and one thousand dollars (\$1,000) each, as may be determined by said State Treasurer, and shall be signed by the Governor of the State and State Treasurer and sealed with the Great Seal of the State. The coupons thereon may be signed by the State Treasurer alone, or may have a facsimile of his signature printed, engraved, or lithographed thereon, and the said bonds shall in all other respects be in such form as the State Treasurer may direct; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of North Carolina, of any kind whatsoever, which shall be expressed on the face of said bonds. Before selling any of the series of bonds herein authorized to be issued, the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem to be most effectual to secure the par of said bonds at the lowest rate of interest.

He is authorized to sell the bonds herein authorized in such manner as in his judgment will produce the par value of said bonds at the lowest rate of interest, and where the conditions are equal he shall give the preference of purchase to the citizens of North Carolina.

One-twentieth of the total bonds issued under date of January first, one thousand nine hundred and twenty-six, shall be due and payable on the first day of January, one thousand nine hundred and thirty-one, and another one-twentieth of the amount of said bonds shall be due and payable on January first of each year thereafter until the whole series shall be paid, and any bonds issued under this act on any subsequent January first shall be due and payable as follows: One-twentieth of the total amount of said bonds shall be due and payable on the first day of January five years after the date of issuance of said bonds, and one-twentieth on each subsequent January first of each year thereafter until the whole series authorized by this article shall be paid in full. (1925, c. 201, s. 5.)

### **§ 5694 (f). Exemption from taxation.**

The said bonds and coupons shall be exempt from all State, county or municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest paid thereon shall not be subject to taxation as for income, nor shall said bonds and coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation, and it shall be lawful for all executors, administrators, guardians, or other fiduciaries generally to invest in said bonds. (1925, c. 201, s. 6.)



**§ 5694 (g). County board may make loans to districts.**

The county board of education, from any amount borrowed under the provisions of this article, may make loans to special charter, local tax or special taxing districts, and the amount so loaned to any such district shall be payable in twenty annual installments, with interest thereon at the rate the county is required to pay, payable annually in advance. Any amount loaned under the provisions of this act shall be a lien upon the total local tax funds produced in the district. Whenever the local taxes at any time may not be sufficient to pay the installments with the interest, the county board of education must supply the remainder out of the operating and equipment fund, and shall make provisions for the same when the county budget is made and presented to the commissioners in May: *Provided*, nothing in this section shall prevent the county board of education from assuming the entire expense of erecting said building or buildings in any district of the county.

All loans made to such districts, under the provisions of this article, shall be made upon the written petition of a majority of the committee, or board of trustees, of the said district asking for the loan and authorizing the county board of education to deduct a sufficient amount from the local taxes or other funds belonging to said district, other than the teachers' salary fund, to meet the indebtedness to the county board of education. Otherwise, the county board of education shall have no lien upon the local taxes for the repayment of this loan: *Provided*, this lien shall not lie against taxes collected or hereafter levied to pay interest and principal on bonds issued by the authority of any district. (1925, c. 201, s. 7.)

**§ 5694 (h). Statement of expenditures filed.**

Upon the completion of project for which the loan was made, the county board of education, upon blanks prepared for this purpose, shall file with the State Board of Education an itemized sworn statement of all expenditures on said project, including the loan from the State and all other funds invested in such building. Members of the county board of education and the county superintendent refusing or failing to make such report or authorizing the expenditure of said loan otherwise than upon the specific project, set forth in the approved application, or otherwise than as set out in the plans and specifications, approved by the State Board of Education, except upon the written approval of the State Board of Education, shall be severally guilty of a misdemeanor, punishable by a fine or imprisonment, or both, in the discretion of the court. (1925, c. 201, s. 8.)

**Subchapter X. Vocational Education****ART. 32. COUNTY FARM-LIFE SCHOOLS****§ 5722. Appropriation of state funds; number of schools.**

Upon satisfactory evidence furnished by the state board for vocational education to the state board of education that all the pro-

visions of this article for the establishment, maintenance, and equipment of a "County Farm-life School" have been complied with in any county, the state superintendent of public instruction shall issue a requisition upon the state auditor for a sum equal to the amount appropriated by the county board of education or secured from local donations or both, but not to exceed five thousand dollars (\$5,000.00) annually, for the maintenance of said school, and the state auditor shall issue his warrant in favor of the county treasurer of said county for said amount, which shall be paid out of the state treasury and the money placed to the credit of the "County Farm-life School" of said county; and sufficient moneys to pay said warrants are hereby appropriated out of the state public school fund: *Provided*, however, that there shall not be established more than ten such schools in any one year, and that not more than one such school shall be established in any county. (C. S. 5578; 1923, c. 136, s. 312; 1925, c. 275, s. 6.)

**Editor's Note.**—By the Act of 1925, a provision as to appropriation from state funds if the school fund should be insufficient was omitted.

#### ART. 34. VOCATIONAL REHABILITATION OF PERSONS DISABLED IN INDUSTRY OR OTHERWISE

##### § 5727 (a). Continuation of work of Board for Vocational Rehabilitation.

The State Board for Vocational Education is hereby authorized to continue its work in the Division of Vocational Rehabilitation from the contingent funds heretofore appropriated out of the public school fund for this purpose: *Provided*, this work shall not be continued beyond March fourth, one thousand nine hundred and twenty-five, unless the appropriation from the Federal Government is made available prior to said date; and *Provided further*, that the State Board for Vocational Education may not exceed the amount set aside from State funds for this purpose. (1924, c. 4.)

#### Subchapter XI. Text-Books and Public Libraries

##### ART. 35. TEXT-BOOKS FOR ELEMENTARY GRADES

##### § 5739. State board of education makes all contracts.

(a) The state board of education shall make all needful rules and regulations governing the advertisement for bids, when and how prices shall be submitted, when and how sample books for adoption shall be submitted, the nature of the contract to be entered into between the state board of education and the publishers, the nature and kind of bond, if any is necessary, and all other needful rules and regulations governing the adoption of books for the elementary schools not otherwise specified in this act. After a contract has been entered into between the state board of education and the publisher, if the publisher shall fail to keep its contract as to prices, distribu-



tion of books, etc., the attorney-general shall bring suit against said company, when requested by the state board of education, for such amount as may be sufficient to enforce the contract or to compensate the state because of the loss sustained by a failure to keep this contract. [(b) It shall be unlawful for any local distributing agency distributing State-adopted text-books to charge or to make any deduction from the purchase price of such textbooks when returned by the purchaser without having been subjected to use or damage.

Any person violating any of the provisions of this subsection shall be deemed guilty of a misdemeanor and upon conviction fined not less than fifty dollars or imprisoned (not) more than thirty days.] (1923, c. 136, s. 329; 1925, c. 69.)

**Editor's Note.**—The word “not” should clearly be inserted between the words “imprisoned” and “more.” It was omitted in the Act of 1925.

## **Subchapter XII. Compulsory Attendance in Schools**

### **ART. 39. GENERAL COMPULSORY ATTENDANCE LAW**

#### **§ 5757. Parent or guardian required to keep child in school; exceptions.**

Every parent, guardian or other person in the state having charge or control of a child between the ages of seven and fourteen years shall cause such child to attend school continuously for a period equal to the time which the public school in the district in which the child resides shall be in session. The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse the child from temporary attendance on account of sickness or distance of residence from the school, or other unavoidable cause which does not constitute truancy as defined by the state board of education. [The term “school” as used in this section is defined to embrace all public schools and such private schools as have tutors or teachers and curricula that are approved by the county superintendent of public instruction or the State Board of Education.

All private schools receiving and instructing children of compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such children as are required of public schools; and attendance upon such schools, if the school or tutor refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district, town or city which the child shall be entitled to attend: *Provided*, instruction in a private school or by private tutor shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term.] (C. S. 5758; 1923, c. 136, s. 347; 1925, c. 226.)

**Validity of Expenditure for School Houses Emphasized.**—While it is held that chapter 147, Laws of 1921, providing for a bond issue to aid the counties in building and equipping the schoolhouses necessary for the accommodation of the pupils for a six-month term of school, is a reasonable

and valid exercise of the legislative power under Article IX of the Constitution, emphasized by C. S., 5758 [5757 Vol. III, C. S.,] et seq., passed in pursuance of section 15 thereof, making it an indictable offense where there is a willful failure to attend the public schools, the principle announced does not withdraw from the scrutiny or control of the court cases where the exercise of the legislative authority has been arbitrary and without limit as to the amount; or where the school authorities depart from any and all sense of proportion and enter on a system of extravagant expenditure, clearly amounting to manifest abuse of the powers conferred. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612.

**Failure to Charge as to Other Than District School.**—For a conviction under the provision of this section it is necessary for the indictment to allege, and the State offer evidence tending to show not only that the parent or guardian of the children within the described age had failed or refused to send them to the public school within the district, but also that such child or children had not been sent to attend school periodically for a period equal to the time which the public school in the district in which they reside shall be in session. *State v. Johnson*, 188 N. C. 591, 125 S. E. 183.

**Same—Burden Not on Parent.**—Where the indictment is defective in failing to charge that a parent or guardian had also failed to send the child or children to another than the district school, etc., under the provisions of this section and the State offers no evidence in respect to it, it is not required that the parent or guardian offer evidence to show that he had complied with this proviso of the statute; and an instruction of the court to the jury placing the burden upon the defendant to so show, is reversible error. *State v. Johnson*, 188 N. C. 591, 125 S. E. 183.

**Same—Amendment of Indictment.**—Where the indictment in the court of a justice of the peace does not sufficiently allege the failure of the parent or guardian to send the child to another than the public school in the district, as required by this section an amendment may be allowed by the judge of the Superior Court to cure the defect and proceed with the trial: but such amendment may not be allowed in the Supreme Court on appeal over an error committed in the instructions of the trial judge to the jury to the defendant's prejudice. *State v. Johnson*, 188 N. C. 591, 125 S. E. 183.

## § 5761. Investigation and prosecution by county superintendent and attendance officer.

The county superintendent of public welfare or chief school attendance officer or truant officer provided for by law shall investigate and prosecute all violators of the provisions of this article. [The reports of unlawful absence required to be made by teachers and principals to the chief attendance officer shall, in his hands, in case of any prosecution, constitute prima facie evidence of the violation of this article and the burden of proof shall be upon the defendant to show the lawful attendance of the child or children upon an authorized school.] (C. S. 5762; 1923, c. 136, s. 351; 1925, c. 226.)

## Subchapter XIII. Normal Schools

ART. 41. STATE BOARD TO CONTROL CERTAIN NORMAL SCHOOLS

## § 5775. State board of education to control and manage negro normal schools.

The state board of education shall have supervision, and shall prescribe rules and regulations for the control, management, and en-



largement of each of the following normal schools: the Elizabeth City state normal school, Elizabeth City; Fayetteville state normal school, Fayetteville; Slater state normal school, Winston-Salem; Cherokee Indian state normal school, Pembroke.

The state board of education shall make all needful rules and regulations concerning the expenditure of funds, the selection of principals, teachers, and employees.

The state board of education, in its judgment, may organize the schools mentioned in this section on the same plane as that provided for the organization of the normal schools designated in section 5768; or it may change the organization to suit conditions: *Provided*, the needs of the school and the funds appropriated demand such a change. (1921, c. 61, s. 8; 1925, c. 306, s. 9.)

**Editor's Note.**—By the act of 1925 the words “and concerning the selection of members of the board of trustees” were stricken from the second paragraph of this section, to conform with section 5775(a).

### **§ 5775 (a). Trustees for certain normal schools.**

The Governor shall appoint for each of the following institutions: The Elizabeth City State Normal School at Elizabeth City, the Fayetteville State Normal School at Fayetteville; Cherokee Indian Normal School at Pembroke; State Teachers' College for Negroes at Winston-Salem, nine (9) trustees, five of whom shall be appointed within thirty days from March 10, 1925 and four of whom shall be appointed within six months from March 10, 1925. At the time of making such appointment the Governor shall name which of the present boards are to be succeeded by his appointees. The terms of the said trustees shall be four years from the date of their appointment. The Governor shall fill all vacancies. The Governor shall transmit to the Senate at the next session of the General Assembly following his appointment the names of persons appointed by him for confirmation. (1925, c. 306, s. 9.)

**Editor's Note.**—For removal of the officers provided for in this section see section 5912(h).

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## CHAPTER 96

### **EDUCATIONAL INSTITUTIONS**

#### **ART. 1. UNIVERSITY OF NORTH CAROLINA**

### **§ 5784. Escheats to university.**

**In General.**—The University of North Carolina, under its charter, since confirmed by our state Constitution, Art. IX, section 7, and now embraced in this section, has the right by escheat to the property of a decedent, who has died intestate, leaving no one else to whom it would go under our statutes of descent and distribution. In re Will of Neal, 182 N. C. 405, 109 S. E. 70.

**§ 5800. Tuition fees, free tuition.**

[The trustees are authorized and directed to fix the tuition fees at the University in such amount or amounts as they may deem best, taking into consideration the nature of each department and the cost of equipment and maintaining the same], to be paid in cash or by good note, and are further instructed to charge and collect from each student at the beginning of each term an amount sufficient to pay room rent, servant's hire, etc., for the term; but no young man of good moral character shall be denied admission because of his inability to pay cash or give a good note. The trustees are further instructed to adopt such rules for the admission of ministers' sons, candidates for the ministry, young men afflicted with bodily infirmity, and students preparing themselves for the purpose of teaching, as are adopted by other colleges throughout the state. All students in the normal department shall receive free tuition in this department if they agree in writing to teach for one year after leaving the university; but they shall pay full tuition in other departments. All other students shall require to give their notes with the understanding that should they become able they shall pay the balance due the university at the time of their graduation in full. [This section is applicable to the students of the North Carolina State College of Agriculture and Engineering so far as it relates to free tuition, and the faculty of the said college are authorized and empowered to grant free tuition to students at said college under the same circumstances as free tuition is now granted to students of the University of North Carolina]. Rev., s. 4275; Code, ss. 2633, 2634, 2635; 1885, c. 143, ss. 2, 3; 1887, c. 233, ss. 1, 2, 3; 1925, c. 256, s. 1; 1924, c. 26.)

**ART. 2. NORTH CAROLINA STATE COLLEGE OF AGRICULTURE AND ENGINEERING****§ 5821 (a). Trustees to fix tuition fees.**

The board of trustees of the North Carolina State College of Agriculture and Engineering are authorized and directed to fix the tuition fees at the said college in such amount or amounts as they may deem best, taking into consideration the nature of each department and the cost of equipment and maintaining the same: *Provided, however*, that this section shall not be held or construed to affect or modify the provisions of sections five thousand eight hundred and twenty and five thousand eight hundred and twenty-one of the Consolidated Statutes of North Carolina. (1925, c. 256, s. 2.)

**§ 5825 (j). Land for experimental purposes.**

The governing authorities of the State Prison and the board of trustees of North Carolina State College of Agriculture and Engineering are hereby authorized to enter into an agreement whereby a certain portion of the land located near Method, North Carolina, and in the possession of the governing authorities of the State Prison



may be conveyed to the college for a term of years or in fee simple, to be used by said college for research, experimental or demonstration purposes, and whenever an agreement is entered into, the Governor and Secretary of State are authorized to execute a lease or deed conveying to the College the number of acres of land agreed upon subject to the provisions of the act for the reorganization of the State Prison. (1925, c. 193, s. 1.)

**§ 5825 (k). Joint employment by college and state.**

Whenever it shall be to the advantage of the North Carolina State College of Agriculture and Engineering and any department of the State government to employ jointly any person, the board of trustees of the college, and the governing authority of the department, on the approval of the Governor, are hereby authorized to make such employment and to prorate the amount of the salary and other expenses that each shall be required to pay. (1925, c. 198, s. 2.)

ART. 5. CULLOWHEE STATE NORMAL SCHOOL

**§ 5842 (d). Name changed to Cullowhee State Normal School.**

The name of the Cullowhee Normal and Industrial School, at Cullowhee, North Carolina, is hereby changed to the Cullowhee State Normal School. (1925, c. 270, s. 1.)

**§ 5842 (e). Trustees; appointment; terms; to hold property.**

The present board of trustees of the Cullowhee Normal and Industrial School shall continue in office until their terms shall expire under this article. The board of trustees of the Cullowhee State Normal School shall consist of nine persons to be appointed by the Governor, and shall hold office for four years from and after their appointment. Within thirty days from March 10, 1925 the Governor shall appoint five members of the board. Within six months from March 10, 1925 the Governor shall appoint four others members of the board. At the time of making the appointments as herein provided for the Governor shall designate which members of the present board are to be succeeded by his appointees. Any vacancies occurring in the board shall be filled by the Governor. The Governor shall transmit the names of his appointees to the Senate at the next session of the General Assembly for confirmation. The said board is hereby created a body corporate, to be known as "the board of trustees of Cullowhee State Normal School." All property, real, personal, or mixed, of every kind and character, now owned and under the control of the board of trustees of the Cullowhee Normal and Industrial School at Cullowhee, or owned and under the control of the State Board of Education or of any other person or corporation for the use and benefit of the Cullowhee Normal and Industrial School, is hereby transferred to and the title thereof is hereby vested

in the board of trustees of the Cullowhee State Normal School, who shall take, receive and hold the same for the use and benefit of the State Normal School; the trustees may purchase and hold real and personal property; receive donations, which donations shall be received by them for the purposes expressed by the donors thereof and shall be used for such purpose and no other, and do all other things necessary, proper and useful to carry out the provisions of this article. All property now owned by the Cullowhee Milling Company, a corporation, the stock of which is owned by the trustees, shall be transferred to the board of trustees of the Cullowhee State Normal School and the said corporation shall be dissolved according to law. The trustees shall take over the property of the Cullowhee Milling Company and use it for the benefit of the Cullowhee State Normal School as fully as if it was now owned by the Cullowhee Normal and Industrial School and not by the Cullowhee Milling Company. (1925, c. 270, s. 2.)

#### **§ 5842 (f). Meeting and organization of trustees.**

It shall be the duty of said board of trustees to hold at Cullowhee an annual meeting, at which meeting they shall qualify and organize, and consider recommendations of the president of the normal school, and such other business as may properly come before them. The board shall elect, at such meeting, a chairman and vice chairman, and appoint such committees among their membership as they may deem proper and wise for the conduct of this institution. They may also hold such special meetings from time to time as they may deem necessary. (1925, c. 270, s. 3.)

#### **§ 5842 (g). Trustees to hold property.**

It shall be the duty of the board of trustees of the Cullowhee State Normal School to take and hold all property, of whatever kind, heretofore held by the trustees of the Cullowhee Normal and Industrial School. The said board of trustees and their successors in office shall hold in trust, for the State of North Carolina, all such property as is herein transferred to them, or to be later acquired by them for the purposes of said school. (1925, c. 270, s. 4.)

#### **§ 5842 (h). Duties of trustees.**

It shall be the duty of the board of trustees to provide for the spending of all moneys whatsoever belonging to, appropriated to, or in any way acquired by, the Cullowhee State Normal School; they shall provide for the erection of all buildings, the making of all needed improvements, the maintenance and enlargement of physical plant of the said normal school, and may do all things deemed useful and wise by them for the good of the school: *Provided, however*, that before letting contracts for the erection of any new buildings, the plans for the same shall be approved by the State Superin-



tendent of Public Instruction, by the Secretary of the State Board of Health, and by the Insurance Commissioner of North Carolina. (1925, c. 270, s. 5.)

**§ 5842. (i). Election of president, teachers, employees; qualifications of teachers.**

It shall be the duty of the board of trustees to elect a president of the said normal school, to fix his salary, and his tenure of office. Upon the recommendation of the president, it shall be the duty of the board of trustees to elect other officers, teachers, and employees, to fix their duties, tenure of office and their respective salaries. No person shall be elected as a teacher or shall teach in the regular classes of the Cullowhee State Normal School whose academic and professional qualifications are lower than that represented by graduation from a standard college or its undoubted equivalent: *Provided*, that persons who do not have such qualifications may be elected and may teach as a substitute or temporary teacher. (1925, c. 270, s. 6.)

**§ 5842 (j). Duties of president.**

It shall be the duty of the president to act as secretary of the board of trustees, to keep, in a book to be provided for the purpose, a full and complete record of all meetings of said board, and he shall be the custodian of all records, deeds, contracts and the like. He shall, with the approval of the chairman of the board, call all meetings of the board, giving proper notice to each member of every such meeting. The president shall be the administrative and executive head of the institution. He shall prepare annually, for the board of trustees, a detailed report of the normal school for the preceding year, a copy of which report shall be sent to the State Superintendent of Public Instruction, and a copy shall be filed in the office of the president. (1925, c. 270, s. 7.)

**§ 5842 (k). Purpose of school, standards.**

The central purpose of the Cullowhee State Normal School shall be to prepare teachers for the public schools of North Carolina. To that end, the president shall prepare courses of study, subject to the approval of the State Superintendent of Public Instruction. It shall be the duty of the State Superintendent to visit the Cullowhee State Normal School from time to time, and to advise with the president about standards, equipment and organization, to the end that a normal school of high grade shall be maintained. The standards shall not be lower in the main, than the average standard of normal schools of like rank in the United States. (1925, c. 270, s. 8.)

**§ 5842 (1). Practice or demonstration school.**

It shall be the duty of the board of education and county superintendent of Jackson County to coöperate with the board of trustees of the Cullowhee State Normal School in maintaining a practice or demonstration school. It shall be the duty of the board of trustees

to furnish buildings, equipment, water and lights for such practice school; while the county board of education and the local school authorities shall furnish fuel and janitors, and shall pay all teachers in the practice school the regular State or county salary schedule, with the proviso that any excess in salaries on account of specially qualified teachers shall be paid by the board of trustees of the normal school. The qualifications of teachers in the practice school shall be fixed by the board of trustees; the nomination of such teachers shall be made jointly by the county superintendent and the president; but the practice teachers shall be elected by the school authorities of the local school district. The practice school, while under the general administration and control of the normal school authorities, shall remain an integral part of the county school system, and be subject to the same regulations as to supervision, standards, records, and the like as other graded schools of the county. In case of any disagreement between the officials herein referred to, said dispute shall be referred to the State Superintendent of Public Instruction, whose decision shall be final. (1925, c. 270, s. 9.)

**§ 5842 (m). Endowment fund.**

The board of trustees are hereby authorized to establish a permanent endowment fund, to be loaned to needy and worthy students. The board may receive gifts and donations, and may, after furnishing lights and power to the normal school, sell excess current, if any there shall be, at a rate approved by the corporation commission, to the people in the community, and set aside for said endowment any moneys coming to the institution from such sources. The board of trustees are hereby empowered to make rules and regulations for the proper safeguarding and loaning of said funds. (1925, c. 270, s. 10.)

**§ 5842 (n). Term of trustees; vacancy.**

Except as herein otherwise provided, the trustees of the Cullowhee State Normal School shall be appointed for the term of four years each. Whenever the term of office of any member or members of the board of trustees is about to expire, or should a vacancy occur for any reason, the president shall immediately notify the Governor, to the end that he may make appointment pursuant to this article. (1925, c. 270, s. 11.)

**§ 5842 (o). Appropriations paid to new corporation.**

All appropriations made to the Cullowhee Normal and Industrial School for the fiscal year ending June the thirtieth, one thousand nine hundred and twenty-five, remaining unpaid, on March 10, 1925, shall be paid to the new corporation in the manner and form provided in the appropriation act of one thousand nine hundred and twenty-three. (1925, c. 270, s. 12.)



## ART. 9. EAST CAROLINA TEACHERS' TRAINING SCHOOL

**§ 5866. Board of trustees; appointments; terms; vacancies; oath.**

The said board of trustees of the East Carolina Teachers' College shall be composed of nine (9) persons, together with the State Superintendent of Public Instruction as chairman ex officio, said trustees to be appointed by the Governor; the term of office of the trustees, other than the chairman shall be four (4) years from and after the date of their appointment. All vacancies occurring in the board shall be filled by the Governor. Within thirty days from March 10, 1925, the Governor shall appoint six members of the board and within six months after March 10, 1925, the Governor shall appoint the remaining three. At the time of making the appointment the Governor shall designate which of the present trustees are to be succeeded by his appointees. The Governor shall transmit the names of his appointees to the Senate at the next session of the General Assembly for confirmation. (1907, cc. 820, 515, 1911, c. 159, s. 2; 1925, c. 306, s. 7.)

**Editor's Note.**—The amendment of 1925 provided that the board should be appointed by the governor instead of the board of education. For removal of the officers provided for in this section see section 5912(h).

## ART. 10. STATE SCHOOL FOR THE BLIND AND DEAF

**§ 5873. Directors; appointment; terms; vacancies.**

There shall be eleven (11) directors of the School for the Blind and Deaf at Raleigh, to be appointed by the Governor. Within thirty days from March 10, 1925 the Governor shall appoint six directors and within six months from March 10, 1925 the Governor shall appoint five directors. At the time of making the appointment the Governor shall designate which of the present members of the board are to be succeeded by his nominees and appointees. The terms of the directors shall be four years from their appointment. The Governor shall fill all vacancies. The Governor shall transmit to the Senate at the next session of the General Assembly the names of his appointees for confirmation. (Rev., s. 4188; Code, s. 2228; 1889, cc. 311, 540; 1901, c. 707; 1905, c. 67; 1925, c. 306, s. 10.)

**Editor's Note.**—Two material changes were made by the Act of 1925. The term of the directors was decreased from six to four years. There were formerly three classes, appointed at intervals of two years. All are now appointed in the same year. For removal of the officers provided for in this section see section 5912(h).

**§§ 5887, 5887 (a), 5887 (b). Appropriations.**

(Repealed: 1925, c. 275, s. 6.)

## ART. 11. NORTH CAROLINA SCHOOL FOR THE DEAF

**§ 5889. Directors; terms; vacancies.**

The North Carolina School for the Deaf at Morganton shall be under the control and management of a board of directors consisting of seven (7) members. Within thirty days from March 10, 1925 the Governor shall appoint four directors, and within six months from March 10, 1925 the Governor shall appoint three directors. At the time of making such appointment the Governor shall designate which of the present board are to be succeeded by his appointees. The terms of the said trustees shall be four years from the date of their appointment. The Governor shall fill all vacancies. The Governor shall transmit to Senate at the next session of the General Assembly the names of his appointees for confirmation. (Rev., s. 4203; 1891, c. 399, s. 2; 1901, c. 210; 1925, c. 306, s. 11.)

**Editor's Note.**—Two material changes were made by the Act of 1925. The term of the directors was reduced from four to six years. There were formerly three classes appointed at intervals of two years. All are now appointed in the same year. For removal of the officers provided for in this section see section 5912(h).

## ART. 13. STATE TRAINING SCHOOL FOR NEGRO BOYS

**§ 5912 (b). Control and management; trustees.**

The State Training School for Negro Boys shall be under the control and management of a board of five trustees. All of the trustees shall be appointed by the Governor. Within thirty days from March 10, 1925 the Governor shall appoint three of the trustees and within six months the remaining two. At the time of making the appointments the Governor shall designate which of the present trustees are to be succeeded by his appointees. The terms of the said trustees shall be four years from and after the date of their appointment. The Governor shall transmit the names of his appointees to the Senate at the next session of the General Assembly for confirmation. All vacancies shall be filled by the Governor. Each member of the board of trustees shall be entitled to receive actual expenses while engaged in the business of the institution. (1921, c. 190, s. 2; 1925, c. 306, s. 6.)

**Editor's Note.**—By the amendment of 1925 it was provided that all the trustees should be appointed in the same year. Formerly they were appointed at intervals of one year. For removal of the officers provided for in this section see section 5912(h).

ART. 14. MISCELLANEOUS PROVISIONS AS TO TRUSTEES, DIRECTORS,  
ETC.**§ 5912 (g). Trustees or directors of the North Carolina College for Negroes at Durham.**

There shall be twelve (12) trustees for the North Carolina College for Negroes at Durham. Within thirty days from March 10,



1925 the Governor shall appoint seven (7) members for each of said boards and within six months from March 10, 1925 the Governor shall appoint five (5) members for each of said boards. At the time of making such appointments he shall designate the members of the present board who are to be succeeded by his appointees. All vacancies are to be filled by the Governor. The Governor shall transmit to the Senate at the next session of the General Assembly following his appointment the names of the persons appointed by him for confirmation. (1925, c. 306, s. 9a.)

**Editor's Note.**—For removal of the officers provided for in this section see section 5912(h).

**§ 5912 (h). To hold office until successor appointed; removal.**

Each of the directors, trustees, managers or other persons whose appointments are provided for in sections 5775(a), 5866, 5873, 5889, 5912(b), 5912(g), 6159, 6159(a), 7172, 7313, 7316, and 7330 shall hold office until his or her successor or successors have been appointed and qualified according to law. The Governor shall have the power to remove any member of any of the boards provided for in the above named sections, by whatsoever name called, whenever in his opinion it is to the best interest of the State to remove such person, and the Governor shall not be required to give any reason for such removal. (1925, c. 306, ss. 13, 14.)

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## CHAPTER 97

### ELECTIONS

#### Subchapter I. General Elections.

##### ART. 4. COUNTY BOARD OF ELECTIONS

**§ 5924. County board; membership; appointment; qualifications.**

**Determination of Results of Primary for County Officers.**—In a primary for county officers the registrar and judges of election have the sole power, acting in their ministerial capacity, to determine whether votes cast in the wrong ballot box should be counted; and they may correct their tabulation of the results thereof to the county board of elections before the latter has judicially determined the results; the duties of the latter board being continuous, under the provisions of the statute, and such powers not being functus officio until they have finally determined the results of the election. *Bell v. County Board*, 188 N. C. 311, 124 S. E. 311.

**§ 5926. To establish or change polling places; new polling books and registration.**

**Notice for New Registration.**—The preliminary notice of twenty days for a new registration for an election provided by this section applies, under the general election law, to an election called by a school district to vote upon

the issuance of bonds by the district for school purposes, and a tax levy to provide for the same. *Miller v. Duke School Dist.*, 184 N. C. 197, 113 S. E. 786.

**Same—Effect of Non Compliance.**—Where the election for the issue of bonds by a township for road purposes has been held in all respects in accordance with the provisions of a statute, at the usual polling places, etc., they will not be declared invalid at the instance of a purchaser, on the ground that notice of the new registration ordered had not been advertised for the full twenty-day period stated in this section amended by the Laws of 1913, or that the full period of the thirty-day notice of the time and place of the election had been advertised as set out in Rev., 2967; when there is no suggestion of fraud and full publicity had been given by newspapers of large local circulation, the election had been broadly discussed beforehand, and it does not appear that any voter is objecting to the bonds or has been deprived of his right to vote. *Board v. Malone*, 179 N. C. 10, 101 S. E. 500.

The failure of a school district to publish the preliminary notice for a new registration of an election to vote upon the issuance of school bonds and provide for the necessary tax levy according to this section does not invalidate the affirmative result of the election or affect the validity of the bonds or levy, when it appears that the new registration, as well as the election, had been given ample previous notice by publication in a newspaper circulating extensively in the district; by notice posted at the courthouse door, and three other public places therein; and that from a large vote polled only two electors had voter against the proposition, and it does not appear that any had been deprived of his opportunity to vote. *Miller v. Duke School Dist.*, 184 N. C. 197, 113 S. E. 786.

#### ART. 6. REGISTRATION OF VOTERS

##### § 5947. Time when registration books must be open; oath of registrar.

**Effect of Non Compliance on Bond Issue.**—The failure to keep the registry, for the question of the issuance of bonds in a special school district, open for twenty days, etc., required by this section, does not of itself render invalid the issuance of the bonds accordingly approved when it appears that the matter was fully known and discussed, opportunity offered every voter to register, there was nothing to show that every elector desiring to vote had not done so, and there was no opposition to the measure manifested. *Hammond v. McRae*, 182 N. C. 747, 110 S. E. 102 See notes of this case under sec. 7, Art. VII; sec. 1, Art. V.

#### ART. 8. ABSENT ELECTORS

##### § 5960. Registration and voting by mail.

**Constitutionality.**—There being no provision in the Federal Constitution restricting the power of the State Legislature to enact statutes on the subject, our absentee voters law, Art. 8, ch. 95, Consolidated Statutes, as amended by ch. 322, Public Laws of 1919, known as the absentee voters law are valid unless in contravention of the Constitution of our State. *Jenkins v. State Board*, 180 N. C. 169, 104 S. E. 346.

The provisions of Art. VI, section 2, of our State Constitution, and of section 3 of the same article do not require that the elector shall cast his vote in person, and under our absentee voters law, he complies with the constitutional provisions that he shall offer to vote, when he transmits his vote to the registrar to be cast for him in accordance with the methods prescribed by the statutes. *Jenkins v. State Board*, 180 N. C. 169, 104 S. E. 346.



**Voters within County.**—Under the provisions of Public Laws of 1917, ch. 23, those who were within the county at the time of an election were not accorded the privilege of voting as absentee voters; and the votes of those who were within the county and cast by this method, before the amendment of 1919, are invalid, and should not be counted. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

**Provision Requiring Physician's Certificate or Affidavit Mandatory.**—The amendment by Public Laws of 1919 of those of 1917, now this section, allowing electors within the voting district, without being present at the polls, to vote in the prescribed manner, is upon the condition precedent that with their ballots so to be cast, it shall be shown by a certificate of a physician or by affidavit that such persons were physically unable to attend, as it was intended as a matter of public policy, to prevent fraud in elections; and its compliance being within the power of such electors, the statute in this respect is mandatory; and where a sufficient number of them have so voted as to result in less than a majority of the registered voters for the special tax or bonded debt a school district proposes to issue, the certified result in favor of the proposition will be declared invalid. *Davis v. County Board*, 186 N. C. 227, 119 S. E. 372.

#### § 5964. Opening votes of absent voters.

It shall be the duty of the registrar in each precinct to open at three p. m. [eight a. m., or at any time during election day that may be selected by the registrar for better expediting the matter of voting, provided that the words in brackets shall apply only to Transylvania county] on the day of election all such letters received from such voters, and count the certificates provided for in the second preceding section. (1917, c. 23, s. 5; 1919, c. 322, s. 4; 1925, c. 204, s. 1.)

#### § 5968. Construction in favor of absentees right.

**When Not Applicable.**—This section has no application when the elector desires to avail himself of a special privilege and does not, of his own volition, comply with the conditions precedent prescribed by the statute, which gives him the right to do so. *Davis v. County Board*, 186 N. C. 227, 119 S. E. 372.

### ART. 9. JUDGES OF ELECTION

#### § 5969. Appointment.

The county board of elections for each county, on or before the first Monday in September, in the year of our Lord one thousand nine hundred and six, and biennially thereafter, or at such other times as it shall be necessary to do so, shall appoint two persons who shall act as judges of election at each place of holding elections in their respective districts, each of whom shall be men of good moral character and able to read and write. The chairman of each political party in each county shall [have the right to] recommend three electors, residing in the precinct, who shall be men of good moral character, and able to read and write, for judges of election in such precinct: *Provided*, that no person holding any office or place of trust or profit under the government of the United States or the state of North Carolina, except justices of the peace, shall be eligible to appointment. And the county board of elections shall appoint one

judge of election out of each list so recommended: *Provided*, said lists shall be filed by such chairman by twelve o'clock m. on said first Monday in September. [The words appearing in brackets above shall not apply to Transylvania county]. (Rev., s. 4336; 1901, c. 89, s. 20; 1925, c. 204, s. 1.)

#### ART. 11. CONDUCT OF ELECTIONS

### § 5979. Voter may deposit his own ballot.

**Choice as to Voting.**—The provisions of our State Constitution, Art. VI, sec. 6, making the distinction that the elector shall vote by ballot, and an election by the General Assembly shall be viva voce, gives under our statute, the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. *Jenkins v. State Board*, 180 N. C. 169, 104 S. E. 346.

#### ART. 12. COUNTY BOARD OF CANVASSERS

### § 5986. To canvass returns and determine result.

**Broad Powers of County Board.**—The following case contains no construction of this section in the majority opinion, however, *Clark, C. J.*, dissenting, said: In this section the power and authority of the county board are broadened to judicially pass upon all facts relative to the election, not merely the returns, and to judicially determine and declare the results of the same. So that what the court below has held to be the whole duty of the board is stated by the Legislature to be in addition to the larger duty of passing upon "all facts" relative to the election, and there is the still further judicial function of sending for "papers and persons" and "examining the same." *Rowland v. Board*, 184 N. C. 78, 85, 113 S. E. 629.

**Returns Prima Facie Correct.**—In proceedings in the nature of a quo warranto, to determine the respective rights of the parties contesting for an office, the result of the election, as declared by the county board of canvassers, must be taken as prima facie correct. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593.

## Subchapter II. Primary Elections

#### ART. 17. PRIMARY ELECTIONS

### § 6032. Counting ballots and certifying results.

**Distinguished from General Elections.**—In primary elections the return for county officers must be certified as this section requires to the county board of elections, which shall publish the result, the distinction between elections of this character and general elections being that in the former there is no right to an election to public office which may be put in issue and determined by quo warranto, and no provision for a board of canvassers with power judicially to determine the precinct return. *Bell v. County Board*, 188 N. C. 311, 124 S. E. 311.

**When Ballot Found in Wrong Box.**—In primary elections for county officers the register and judges of election are authorized not only to pass upon the qualification of voters therein, but to determine whether a ballot found in the wrong box was placed there by mistake, and, if satisfied of the mistake, to count the ballots for the one for whom they had been cast, in making their returns to the county board. *Bell v. County Board*, 188 N. C. 311, 124 S. E. 311.



**§ 6036. Primaries for county offices; voting and returns.**

See notes to section 6032.

**§ 6042. County board tabulates results of primaries; returns in duplicate.**

**Distinction between General and County Elections Valid.**—The courts will not determine the reasonableness of the legislative enactment differentiating the authority of the county board of elections in passing upon the qualification of the electors for a precinct in a primary selection of a candidate for a county office, from the powers to be exercised by it in a general election, this being a matter entirely within the province of legislation and not subject to judicial injury by the courts. *Rowland v. Board*, 184 N. C. 78, 113 S. E. 629.

**Power to Pass on Qualification of Voters.**—The primary law to select a party candidate for a county office repeals all laws inconsistent with its provisions, and by incorporating therein certain provisions of the general election law, confers no authority on the county board of electors to pass upon the qualifications of the voters of a precinct, and thereby change the result of the election from that appearing upon the face of the returns it had officially tabulated. *Rowland v. Board*, 184 N. C. 78, 113 S. E. 629.

Under our primary law the right of a proposed elector to vote for the party's choice of a county official, in this case a register of deeds, is expressly referred to the precinct registrar and judges of election, without power of review, or otherwise, in the county board of elections, the authority of the county board extending only to supervise or to review "errors in tabulating returns or filling out blanks." *Rowland v. Board*, 184 N. C. 78, 113 S. E. 629.

**Mandamus by Candidate.** — Where the county board of elections has assumed to pass upon the qualifications of the electors voting in a primary for the selection of a party candidate for a county office, and in so doing has declared certain of the electors disqualified, and has accordingly changed its returns and declared the one appearing to have received a smaller vote, the choice of the party as a candidate, an action will lie by the one appearing to have received the larger vote, against the county board, to compel them, by mandamus, to tabulate the returns made by the registrars and judges of the precinct, and then to publish and declare the same as the result of the election. *Rowland v. Board*, 184 N. C. 78, 113 S. E. 629.

**§ 6054. Certain counties excepted.**

This article shall not apply to nominations for candidates for county offices and members of the house of representatives in the following counties providing for a primary with respect to said county officers and members of the house of representatives, to wit: Alamance, Alexander, Ashe, Brunswick, Burke, Cabarrus, Catawba, Cherokee, Clay, Dare, Davidson, Davie, Duplin, Edgecombe, Gaston, Graham, Hyde, Lee, Macon, Martin, McDowell, Mitchell, New Hanover, Northampton, [Randolph], Sampson, Stanly, Stokes, Surry, Union, Watauga, Wilkes: *Provided*, that in any county whose county offices are hereby exempted, if voters in number as great as one-fifth of the total vote cast for governor in such county at the preceding gubernatorial election shall petition the board of county commissioners of such county for an election thereon, it shall be the duty of the said board to order an election at the next succeeding general election upon the method of nominating county officers

and member or members of the house of representatives. At such election those favoring the nomination of county and legislative officers by primary shall cast ballots on which is written or printed "For County Primary;" those opposed shall cast ballots bearing the words "Against County Primary." If a majority of the votes cast in such election shall be "For County Primary," then the provisions of this act shall thereafter apply to such county, and it shall be no longer exempted. Otherwise, such exception shall remain in force. (1915, c. 101, s. 34; 1915, c. 102; 1917, cc. 53, 86, 89, 90, 91, 92, 112, 137, 222, 225, 218; P. L. 1917, cc. 312, 327, 351, 373; 1919, cc. 41, 81, 95, 173, 278, 283, 337; Ex. Sess. 1920, cc. 16, 57; 1923, cc. 21, 30, 44, 50, 88, 137, 226; 1925, c. 20, s. 1; c. 147; c. 197.)

**Editor's Note.**—By the various Acts of 1925 cited at the end of this section, Randolph county was added to this section and Montgomery and Pender stricken out.

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## CHAPTER 98

### FIREMEN'S RELIEF FUND

#### ART. 1. STATE APPROPRIATION

#### §§ 6056, 6057. Appropriation.

(Repealed: 1925, c. 275, s. 6.)

#### § 6058. Application of fund.

The money so paid into the hands of the treasurer of the North Carolina state firemen's association shall be known and remain as the "firemen's relief fund" of North Carolina, and shall be used as a fund for the relief of firemen, members of such association, who may be injured or rendered sick by disease contracted in the actual discharge of duty as firemen, and for the relief of widows, children, and if there be no widow or children, then dependent mothers of such firemen killed or dying from disease so contracted in such discharge of duty; to be paid in such manner and in such sums to such individuals of the classes herein named and described as may be provided for and determined upon in accordance with the constitution and by-laws of said association, and such provisions and determinations made pursuant to said constitution and by-laws shall be final and conclusive as to the persons entitled to benefits and as to the amount of benefit to be received, and no action at law shall be maintained against said association to enforce any claim or recover any benefit under this article or under the constitution and by-laws of said association; but if any officer or committee of said association omit or refuse to perform any duty imposed upon him or them, nothing herein contained shall be construed to prevent any proceedings against said officer or committee to compel him or them to perform such duty. [No fireman shall be entitled to receive any benefits un-



der this section until the firemen's relief fund of his city or town shall have been exhausted]. (Rev., s. 4393; 1891, c. 468, s. 3; 1925, c. 41.)

### **§ 6059. Treasurer to file report and give bond.**

The treasurer of the North Carolina State Firemen's Association shall make a detailed report to the State Treasurer of the yearly expenditures of the appropriation under this chapter on or before the end of the fiscal year, showing the total amount of money in his hands at the time of the filing of the report, and shall give a bond to the State of North Carolina with good and sufficient sureties to the satisfaction of the treasurer of the State of North Carolina in a sum not less than the amount of money on hand as shown by said report. (Rev., s. 4394; 1891, c. 468, s. 4; 1925, c. 41.)

**Editor's Note.**—The provision for a report of expenditures is new with the Act of 1925.

### **§ 6060. Who shall participate in the fund.**

The line of duty entitling one to participate in the fund shall be so construed as to mean actual fire duty only, and any actual duty connected with the fire department when directed to perform the same by an officer in charge. (Rev., s. 4395; 1891, c. 468, s. 5; 1925, c. 41.)

**Editor's Note.**—By the Act of 1925, clause defining the time of actual fire duty as service from the time of alarm until dismissal at roll-call, was omitted from the section.

### **§ 6061. Who may become members.**

Any organized fire company in North Carolina, holding itself ready for duty, may, upon compliance with the requirements of said constitution and by-laws, become a member of the North Carolina State Firemen's Association, and any firemen of good moral character in North Carolina, and belonging to an organized fire company, who will comply with the requirements of the constitution and by-laws of the North Carolina State Firemen's Association, may become a member of said association. (Rev., s. 4396; 1891, c. 468, s. 6; 1925, c. 41.)

**Editor's Note.**—No change is made in the substance of this section by the Act of 1925.

### **§ 6062. Applied to members of regular fire company.**

The provisions of this chapter shall apply to any fireman who is a member of a regularly organized fire company, [and is a member in good standing of the North Carolina State Firemen's Association]. (Rev., s. 4397; 1891, c. 468, s. 7; 1925, c. 41.)

## ART. 2. FUND DERIVED FROM FIRE INSURANCE COMPANIES

**§ 6067. Insurance Commissioner to pay fund to treasurer.**

[The Insurance Commissioner shall deduct the sum of five per cent from the money so collected from the insurance companies, corporations, or associations, as aforesaid, and pay the same over to the treasurer of the State Firemen's Association for general purposes], and the remainder of the money so collected from the insurance companies, corporations, or associations, as aforesaid, doing business in the several towns and cities in the State having or that may hereafter have organized fire departments as provided in this article, said Insurance Commissioner shall pay to the treasurer of each town or city to be held by him as a separate and distinct fund, [and he shall immediately pay the same to the treasurer of the local board of trustees upon his election and qualification, for] the use of the board of trustees of the firemen's local relief fund in each town or city, composed of five members, residents of said city or town as hereinafter provided for, to be used by them for the purposes as named in section six thousand and sixty-nine. (1907, c. 831, s. 5; 1925, c. 41.)

**§ 6068. Trustees appointed; organization.**

In each town or city complying with and deriving benefits from the provisions of this article there shall be appointed annually, in January, a local board of trustees, known as the trustees of the firemen's relief fund, to be composed of five members, two of whom shall be named by the members of the local fire department, two by the mayor and board of aldermen or other local governing body, and the remaining member by the state insurance commissioner, all to hold office for two years, or until their successors are appointed, and to serve without pay for their services. They shall immediately after appointment organize by electing from their members a chairman and a secretary and treasurer, which two last positions may be held by the same person. The treasurer of said board of trustees shall give a good and sufficient bond, [as a sum equal to the amount of moneys in his hands] to be approved by the insurance commissioner, for the faithful and proper discharge of the duties of his office. (1907, c. 831, s. 6; 1925, c. 41.)

**§ 6069. Disbursement of fund by trustees.**

The board of trustees shall have entire control of the funds derived from the provisions of this article, and shall disburse the funds only for the following purposes:

1. [To safeguard any fireman in active service from financial loss, occasioned by sickness contracted or injury received while in the performance of his duties as fireman.]

2. To provide a reasonable support for those actually dependent upon the services of any fireman who may lose his life in the fire



service of his town, city, or state, either by accident or from disease contracted or injury received by reason of such service. The amount is to be determined according to the earning capacity of the deceased.

3. To safeguard any fireman who has honorably served for a period of [five] years in the fire service of his city or town from ever becoming an inmate of any almshouse or actually dependent upon charity.

4. [To provide for any fireman or person dependent on any fireman from becoming a subject of charity due to other sickness or accident or condition not specified in this law; and to provide for the payment of any fireman's assessment in the firemen's fraternal insurance fund of the state of North Carolina, if the board of trustees find as a fact that said fireman is unable to pay the said assessment by reason of disability.] (1907, c. 831, s. 6; 1919, c. 180; Ex. Sess. 1921, c. 55; 1923, c. 22; 1925, c. 41.)

**§ 6070. Trustees to keep account and file report; effect of failure.**

The board of trustees shall keep a correct account of all moneys received and disbursed by them, and shall at the annual meeting of the North Carolina state firemen's association render an itemized statement of the same, for publication in the annual report, a copy of which report shall be made annually to the state insurance commissioner; and in case any board of trustees in any of the towns and cities benefited by this article shall neglect or fail to perform their duties, or shall wilfully misappropriate the funds entrusted to their care, or shall neglect or fail to report at the annual meeting of the state association, then the insurance commissioner shall withhold any and all further payments to such board of trustees, or their successors, until the matter has been fully investigated by an official of the state firemen's association, and adjusted to the satisfaction of the state insurance commissioner. Should such payments be unadjusted for a period of fifteen months from the time when such payment would otherwise have been made, then the insurance commissioner shall pay over the said [amount to the treasurer of the North Carolina State Firemen's Association and it shall constitute a part of the firemen's relief fund]. (1907, c. 831, s. 7; 1925, c. 11.)

**§ 6071. Municipal clerk to certify list of fire companies; effect of failure.**

The clerk of any city, town, village, or other municipal corporation having an organized fire department shall, on or before the thirty-first day of October in each year, make and file with the insurance commissioner his certificate, stating the existence of such department, the number of steam, hand, or other engines, hook and ladder trucks, and hose carts in actual use, the number of organized companies, and the system of water supply in use for such departments, together with such other facts as the insurance commissioner may

require, on a blank to be furnished by him. If the certificate required by this section is not filed with the insurance commissioner on or before October thirty-first in any year, the city, town or village so failing to file such certificate shall [forfeit the payment next due to be paid to said board of trustees, and the Insurance Commissioner shall pay over said amount to the treasurer of the North Carolina State Firemen's Association and same shall constitute a part of the firemen's relief fund]. (1925, c. 309, s. 1; 1907, c. 831, s. 8; 1925, cc. 41, 309.)

**§ 6072. Fire departments to be members of state association and send delegate to meeting.**

For the purpose of supervision and as a guaranty that provisions of this article shall be honestly administered in a business-like manner, it is provided that every department enjoying the benefits of this law shall be a member of the North Carolina state firemen's association, and [send at least one accredited delegate to the annual meeting of said association and comply with its constitution and by-laws. If the fire department of any city, town or village shall fail to send at least one delegate to the annual meeting of the State Firemen's Association and otherwise fails to comply with the constitution and by-laws of said association, said city, town or village shall forfeit its right to the next annual payment due from the funds mentioned in this article, and the Insurance Commissioner shall pay over said amount to the treasurer of the North Carolina State Firemen's Association and same shall constitute a part of the firemen's relief fund: *Provided, however,* that the failure of any department to have a delegate or representative present at the annual meeting of the association shall not have such effect if in the opinion of a majority of the executive committee of said association such delegate or representative had a valid excuse for his failure so to attend.] (1907, c. 831, s. 9; 1919, c. 180; 1925, c. 41; 1925, c. 309, s. 2.)

**§ 6073. No discrimination on account of color.**

Inasmuch as there are in a number of the towns and cities of this state fire companies composed exclusively of colored men, it is expressly provided that the local boards of trustees shall make no discrimination on account of color in the payment of benefits. [The treasurer of the North Carolina State Firemen's Association shall pay to the treasurer of the North Carolina State Volunteer Firemen's Association one-sixth of the funds arising from the five per cent paid him by the Insurance Commissioner each year, to be used by said North Carolina State Volunteer Firemen's Association for general purposes.] (1905, c. 831, s. 10; 1925, c. 41.)



## CHAPTER 99

**FIRE PROTECTION**

## ART. 1. INVESTIGATION OF FIRES AND INSPECTION OF PREMISES

**§ 6078. Payment of expenses.**

The license tax imposed upon fire insurance companies shall be used by the insurance commissioner for the purpose of investigating all fires occurring in the state, for the payment of expenses, including counsel fees, expense of deputy, detectives and officers, incurred by him in the performance of the other duties imposed upon him by this article, for the employment of a competent man to give instructions to fire companies, and for the expense of a better inspection of buildings in cities and towns. [It shall be the duty of the insurance commissioner to appoint two or more persons as deputies, whose particular duty it shall be to investigate forest fires and endeavor to ascertain the persons guilty of setting such fires and cause prosecution to be instituted against those who, as a result of such investigation, are deemed guilty]. Any part of such fund unexpended at the end of the fiscal year, April first, shall be paid by the insurance commissioner into the state treasury for general purposes as other funds collected by him. (Rev., s. 4823; 1899, c. 58, s. 6; 101, c. 387, s. 6; 1903, c. 719, s. 2; 1915, c. 109, s. 2; 1919, c. 186, s. 7; 1924, c. 119.)

**§ 6080. Fire prevention and fire prevention day.**

It is the duty of the insurance commissioner and superintendent of public instruction, as far as practicable, to provide, [a pamphlet containing printed instructions for properly conducting fire drills in schools, and the superintendent or principal of every public school in this State shall conduct at least one fire drill every month during the regular school session, such fire drills to include all children and teachers and the use of all ways of egress, and the Insurance Commission and Superintendent of Public Instruction shall further provide] for the teaching of "Fire Prevention" in the colleges and schools of the state, and to arrange for a text-book adapted to such use. The ninth day of October of every year shall be set aside and designated as "Fire Prevention Day," and the governor shall issue a proclamation urging the people to a proper observance of the day, and the insurance commissioner shall bring the day and its observance to the attention of the officials of the municipalities of the state, and especially to the firemen, and where possible arrange suitable programs to be followed in its observance. [*Provided*, that the part of this section in brackets should not apply to schools taught in one-story houses]. (1915, c. 166, s. 5; 1925, c. 130.)

**Editor's Note.**—Section 5542 was specifically amended by the Acts of 1925. As in the recodification of the Education Laws, Vol. III, Consolidated Statute, the provisions of section 5542 were omitted, the amendment mentioned is inserted in this the corresponding section.

CHAPTER 101.

**GEOLOGICAL SURVEY AND FORESTS**

ART. 1. ORGANIZATION AND GENERAL PURPOSES.

**§§ 6117-6122 (b). Organization and purposes.**

(Repealed: Act 1925, c. 122, s. 24.)

ART. 1 (A) DEPARTMENT OF CONSERVATION AND DEVELOPMENT.

**§ 6122 (c). Department created.**

There is hereby created and established a department to be known as the "Department of Conservation and Development," with the organization, powers and duties hereafter defined in this article. (1925, c. 122, s. 2.)

**§ 6122 (d). Meaning of terms.**

In this article, unless the context otherwise requires, the expression "department" means the Department of Conservation and Development; "board" means the Board of Conservation and Development; and "director" means the Director of Conservation and Development. (1925, c. 122, s. 3.)

**§ 6122 (e). Objects of the department.**

It shall be the objects of the department—

1. To take over the powers and duties exercised by the State Geological and Economic Survey, the State Geological Board, and the State Geologist, as provided for in chapter one hundred and one of the Consolidated Statutes of one thousand nine hundred and nineteen, and other statutes relating thereto.

2. By investigation, recommendation and publication, to aid

(a) In the promotion of the conservation and development of the natural resources of the State;

(b) In promoting a more profitable use of lands, forests and waters;

(c) In promoting the development of commerce and industry;

(d) In coördinating existing scientific investigations and other related agencies in formulating and promoting sound policies of conservation and development; and

(e) To collect and classify the facts derived from such investigations and from other agencies of the State as a source of information easily accessible to the citizens of the State and to the public generally, setting forth the natural, economic, industrial and commercial advantages of the State. (1925, c. 122, s. 4.)

**§ 6122 (f). Board of Conservation and Development.**

The control and management of the department shall be vested in a board to be known as the "Board of Conservation and Develop-



ment," to be composed of seven members, consisting of the Governor, as chairman, and six other members, citizens of the State, one of whom shall be selected from the staff of the University of North Carolina, and one from the staff of the North Carolina State College of Agriculture and Engineering. (1925, c. 122, s. 5.)

#### **§ 6122 (g). Appointment and terms of office.**

After March 4, 1925, the Governor shall appoint, by and with the advice and consent of the Senate, the six members of the board, three of whom shall serve until the fifteenth day of January, one thousand nine hundred and twenty-nine, and three shall serve until the fifteenth day of July, one thousand nine hundred and twenty-five. The Governor shall designate, in his appointments, the members to serve for the terms mentioned, and at the expiration of such terms he shall appoint the members of the board to serve for a term of four years thereafter. The members of the board shall serve for the terms for which they are appointed and until their successors are appointed and qualified. The Governor shall also designate one member of the board as vice chairman, who shall preside at the meetings of the board in the absence of the Governor. (1925, c. 122, s. 6.)

#### **§ 6122 (h). Meetings of the board.**

The board shall meet twice a year in the city of Raleigh, once in January and once in July, at the call of the Governor; and special meetings may be called at such other times as the Governor or director may consider necessary. The board may change the time and place of meeting as the circumstances may require. (1925, c. 122, s. 7.)

#### **§ 6122 (i). Compensation of board.**

In attending the meetings, the members of the board shall be reimbursed their actual traveling expenses, and members not otherwise receiving a salary from the State may be paid in addition a per diem of four dollars a day for not exceeding eight days in any one year. (1925, c. 122, s. 8.)

#### **§ 6122 (j). Powers and duties of the board.**

The board shall have control of the work of the department, and may make such rules and regulations as it may deem advisable to govern the work of the department and the duties of its employees.

It shall make investigations of the natural, industrial and commercial resources of the State, and take such measures as it may deem best suited to promote the conservation and development of such resources.

It shall have charge of the work of forest maintenance, forest fire prevention, reforestation, and the protection of lands and water supplies by the preservation of forests; it shall also have the care of State forests and parks, and other recreational areas now owned or to be acquired by the State, including the lakes referred to in section

seven thousand five hundred and forty-four of the Consolidated Statutes.

It shall make such examination, survey and mapping of the geology, mineralogy and topography of the State, including their industrial and economic utilization, as it may consider necessary; make investigations of water supplies and water-powers, with recommendations and plans for promoting their more profitable use, and take such measures as it may consider necessary to promote their development.

It shall make investigations of the existing conditions of trade, commerce and industry in the State, with the causes which may hinder or encourage their growth, and may devise and recommend such plans as may be considered best suited to promote the development of these interests.

The board may take such other measures as it may deem advisable to obtain and make public a more complete knowledge of the State and its resources, and it is authorized to cooperate with other departments and agencies of the State in obtaining and making public such information.

It shall be the duty of the board to arrange and classify the facts derived from the investigations made, so as to provide a general source of information in regard to the State, its advantages and resources. (1925, c. 122, s. 9.)

#### **§ 6122 (k). Power to examine witnesses.**

The board, or the director, is authorized, in the performance of their duties, to administer oaths and to subpoena and examine witnesses. (1925, c. 122, s. 10.)

#### **§ 6122 (l). Reports and publications.**

The board shall prepare a report to be submitted by the Governor to each General Assembly showing the nature and progress of the work and the expenditures of the department.

The board may also cause to be prepared for publication, from time to time, reports and statements, with illustrations, maps and other descriptions, which may adequately set forth the natural and material resources of the State and its industrial and commercial developments, with a view to furnishing information to educate the people with reference to the material advantages of the State, to encourage and foster existing industries, and to present inducements for investment in new enterprises. Such reports and information shall be published and distributed as the board may direct, at the expense of the State as other public documents. (1925, c. 122, s. 11.)

#### **§ 6122 (m). Cooperation with agencies of the Federal government.**

The board is authorized to arrange for and accept such aid and cooperation from the several United States Government bureaus and other sources as may assist in completing topographic surveys and in carrying out the other objects of the department, and to continue any



arrangement which may have been heretofore made with such Federal agencies by the Geological and Economic Survey and by the Geological Board.

The board is further authorized and directed to coöperate with the Federal power commission in carrying out the rules and regulations promulgated by that commission; and to act in behalf of the State in carrying out any regulations that may be passed relating to water-powers in this State other than those related to making and regulating rates. (1925, c. 122, s. 18.)

#### **§ 6122 (n). Cooperation with other State departments.**

The board is authorized to coöperate with the North Carolina Corporation Commission in investigating the water-powers in the State, and to furnish the Corporation Commission such information as is possible regarding the location of the water-power sites, developed water-powers, and such other information as may be desired in regard to water-power in the State; the board shall also coöperate as far as possible with the Department of Labor and Printing, the State Department of Agriculture, the Fisheries Commission board and other departments and institutions of the State in collecting information in regard to the resources of the State and in preparing the same for publication in such a manner as may best advance the welfare and improvement of the State. (1925, c. 122, s. 16.)

#### **§ 6122 (o). Cooperation with counties and municipal corporations.**

The board is authorized to coöperate with the counties of the State in any surveys to ascertain the natural resources of the county; and with the governing bodies of cities and towns, with boards of trade and other like civic organizations, in examining and locating water supplies and in advising and recommending plans for other municipal improvements and enterprises. Such coöperation is to be conducted upon such terms as the board may direct. (1925, c. 122, s. 17.)

#### **§ 6122 (p). Director of Conservation and Development.**

The Governor shall appoint a suitable person as Director of Conservation and Development, who shall have charge of the work of the department, under the supervision of the board. The director shall serve for such time as the Governor may designate in his appointment, not to exceed, however, the term of office of the Governor making the appointment, and until his successor is appointed and qualified. (1925, c. 122, s. 12.)

#### **§ 6122 (q). Duties of the director.**

It shall be the duty of the director, under the supervision of the board and under such rules and regulations as the board may adopt, to make, or cause to be made, examinations and surveys of the economic and natural resources of the State and investigations of its industrial and commercial enterprises and advantages, and to perform

such other duties as the board may prescribe in carrying out the objects of the department. (1925, c. 122, s. 13.)

**§ 6122 (r). Compensation of the director.**

The director shall receive an annual salary, to be fixed by the Governor, not to exceed the salary heretofore paid to the State Geologist appointed under section six thousand one hundred and seventeen of the Consolidated Statutes of North Carolina. (1925, c. 122, s. 14.)

**§ 6122 (s). Experts and assistants.**

The director shall appoint, subject to the approval of the board, such experts and assistants as may be found necessary to enable him to carry on successfully the work of the department, among whom he may appoint, subject to the approval of the board and as may be found necessary, a State geologist and a State forester; and the board shall fix the compensation of such experts and assistants. To the State forester and the State geologist such duties may be assigned by the said director, subject to the approval of the board, as may be desired, including those heretofore exercised by those officers so designated. (1925, c. 122, s. 15.)

**§ 6122 (t). Geological board and State Geologist abolished.**

The geological board provided for in section six thousand one hundred and eighteen, and the office of State Geologist as provided for in section six thousand one hundred and seventeen, of Consolidated Statutes, chapter one hundred and one, entitled "Geological Survey and Forests," are hereby abolished: *Provided, however*, that the Geological Board and State Geologist shall perform the duties of such positions until the Board of Conservation and Development provided for in this article qualifies. (1925, c. 122, s. 19.)

**§ 6122 (u). Transfer of property.**

Upon the organization of the department by the appointment and qualification of the board and director, all the property of the State in the hands of Geological Board and of the State Geologist shall be transferred to this department; and all valid contracts of the Geological Board and State Geologist, made in the discharge of their official duties, and still outstanding and unexecuted, shall be binding upon this department. (1925, c. 122, s. 20.)

**§ 6122 (v). Appropriations.**

All appropriations heretofore made for the use of the North Carolina Geological and Economic Survey and which may be made at this meeting of the General Assembly shall be and are hereby transferred to the account and use of the Department of Conservation and Development, to be used by the board in control of the department; and all appropriations, or funds derived or which may be derived from the United States Government or from other sources of revenue



which have been directed or may be directed to be applied to the general purposes of the Geological and Economic Survey in connection with forest protection, reforestation or otherwise shall be used by the board in carrying out the duties of this department. (1925, c. 122, s. 21.)

**§ 6122 (w). Control of State forests.**

The board and director shall have charge of all State forests, measures for forest fire prevention, and all other duties relating to forests heretofore vested in the State Geological and Economic Survey, the Geological Board and the State Geologist. (1925, c. 122, s. 22.)

**§ 6122 (x). Control of Mount Mitchell Park and other State parks.**

The board shall have the control and management of Mount Mitchell Park and of any other parks which have been or may be acquired by the State as State parks. (1925, c. 122, s. 23.)

**ART. 2. ROAD BUILDING AND DEVELOPMENT OF MINERAL RESOURCES**

**§ 6123. Geological board to investigate and advise.**

(Repealed: Act 1925, c. 122, s. 24.)

**ART. 3. STATE FORESTS BY DONATION OR PURCHASE**

**§ 6124. Power to acquire land as State forest.**

The governor of the state is authorized upon recommendation of the [Board of Conservation and Development] to accept gifts of land to the state, the same to be held, protected, and administered by said board as state forests, and to be used so as to demonstrate the practical utility of timber culture and water conservation, and as refuges for game. Such gifts must be absolute except in such cases as where the mineral interest on the land has previously been sold. The state [Board of Conservation and Development] shall have the power to purchase lands in the name of the state, suitable chiefly for the production of timber, as state forests, for experimental, demonstration, educational, park, and protection purposes, using for such purposes any special appropriations or funds available. The attorney-general of the state is directed to see that all deeds to the state for land mentioned in this section are properly executed before the gift is accepted or payment of the purchase money is made. Such state forests shall be subject to county taxes assessed on the same basis as are private lands, to be paid out of money in the state treasury not otherwise appropriated. (1915, c. 253, s. 1; 1925, c. 122, s. 22.)

**§ 6125. Application of proceeds from sale of products.**

All money received from the sale of wood, timber, minerals, or other products from the state forests shall be paid into the state treas-

ury and to the credit of the [Board of Conservation and Development] ; and such money shall be expended in carrying out the purposes of this article and of forestry in general, under the direction of the [Board of Conservation and Development.] (1915, c. 253, s. 2; 1925, c. 122; s. 22.)

#### ART. 4. PRIVATE LANDS DESIGNATED AS STATE FORESTS

##### **§ 6129. Duty of the landowners.**

The owner or owners, when making such written application, shall agree in writing to treat in a conservative manner the proposed state forest described in the application, such manner to be in accordance with a working plan approved by the [Department of Conservation and Development] ; and the owner or owners of such proposed state forest, when making such application, shall agree to pay annually into the school fund of the county wherein such proposed state forest or a part thereof is situated one-half cent for every acre of such proposed state forest situated within the county; and if the owner or owners thereafter shall fail to make such annual payment, then the declaration of the governor establishing the said state forest shall be null and void to all intents and purposes. (1909, c. 89, s. 3; 1925, c. 122, s. 22.)

#### ART. 5. PROTECTION AGAINST FOREST FIRES

##### **§ 6133. Board of Conservation and Development.**

The state [Board of Conservation and Development] may take such action as it may deem necessary to provide for the prevention and control of forest fires in any and all parts of this state, and it is hereby authorized to enter into an agreement with the secretary of agriculture of the United States for the protection of the forested watersheds of streams in this state. (1915, c. 243, s. 1; 1925, c. 122, s. 22.)

##### **§ 6134. State forester and forest wardens.**

The forester of the [Department of Conservation and Development], who shall be state forester, and shall be ex officio state forest warden, may appoint, with the approval of the [Board of Conservation and Development], one township forest warden and one or more [deputy] forest wardens in each township of the state in which the amount of forest land and the risks from forest fires shall, in his judgment, make it advisable and necessary. (1915, c. 243, s. 2; 1925, c. 106, s. 1, c. 122, s. 22.)

##### **§ 6135. Duties of state forester.**

The state forester, as the state forest warden, shall have supervision of township and [deputy] forest wardens, shall instruct them in their duties, issue such regulations and instructions to the township and [deputy] forest wardens as he may deem necessary for the



purposes of this article, and cause violations of the laws regarding forest fires to be prosecuted. (1915, c. 243, s. 3; 1925, c. 106, s. 1.)

#### **§ 6136. Duties of forest wardens.**

Forest wardens shall have charge of measures for controlling forest fires; shall make arrests for violation of forest laws; shall post along highways and in other conspicuous places copies of the forest fire laws and warnings against fires, which shall be supplied by the state forester; shall patrol during dry and dangerous seasons under the direction of the state forester, and shall perform such other acts and duties as shall be considered necessary by the state forester for the protection of the forests from fire. The township forest warden of the township in which a fire occurs shall within ten days make such a report thereof to the state forester as may be prescribed by him. Each [deputy] forest warden shall promptly report to township wardens any fire in his district. (1915, c. 243, s. 4; 1925, c. 106, s. 1.)

#### **§ 6137. Powers of forest wardens to prevent and extinguish fires.**

Forest wardens shall prevent and extinguish forest fires in their respective townships and enforce all statutes of this state now in force or that hereafter may be enacted for the protection of forests and woodlands from fire, and they shall have control and direction of all persons and apparatus while engaged in extinguishing forest fires. Any forest warden may arrest, without a warrant, any person or persons taken by him in the act of violating any of the laws for the protection of forests and woodlands, and bring such person or persons forthwith before a justice of the peace or other officer having jurisdiction, who shall proceed without delay to hear, try, and determine the matter. During a season of drouth the state forester may establish a fire patrol in any township, and in case of fire in or threatening any forest or woodland the township or [deputy] forest warden shall attend forthwith and use all necessary means to confine and extinguish such fire. The forest warden [or his deputies] may summon any male resident of the township between the ages of eighteen and forty-five years to assist in extinguishing fires, and may require the use of horses and other property needed for such purpose; any person so summoned, and who is physically able, who refuses or neglects to assist or to allow the use of horses, wagons, or other material required, shall be [guilty of a misdemeanor and upon conviction shall be subject to a fine] of not less than five dollars nor more than fifty dollars. No action for trespass shall lie against any forest warden or person summoned by him for crossing or working upon lands of another in connection with his duties as forest warden. (1915, c. 243, s. 6; 1925, c. 106, ss. 1, 2; 1925, c. 240.)

#### **§ 6138. Compensation of forest wardens.**

Forest wardens shall receive compensation from the [Board of Conservation and Development] at a [reasonable rate to be fixed by

said board not to exceed the sum of thirty] cents per hour for the time actually engaged in the performance of their duties; and reasonable expenses for equipment, transportation, or food supplies incurred in fighting or extinguishing any fire, according to an itemized statement to be rendered the state forester every month, and approved by him. Forest wardens shall render to the state forester a statement of the services rendered by the men employed by them or their [deputy] wardens, as provided in this article, within one month of the date of service, which bill shall show in detail the amount and character of the service performed, the exact duration thereof, the name of each person employed, and any other information required by the state forester. If said bill be duly approved by the state forester, it shall be paid by direction of the [Board of Conservation and Development] out of any funds provided for that purpose. (1915, c. 243, s. 7; 1924, c. 60; 1925, c. 106, ss. 1, 3, c. 122, s. 22.)

**§ 6140 (a). Cooperation between counties and state in forest fire protection.**

The board of county commissioners of any county are hereby authorized and empowered, in their discretion, to cooperate with the [Department of Conservation and Development] in the protection from fire of the forests within their respective counties, and to appropriate and pay out of the funds under their control for such protection an amount not to exceed one-half of the total expended by said survey in such county during any one year for such protection: Provided, that said board of county commissioners may in addition agree with the [Department of Conservation and Development] to pay any part of or all the expenses incurred in extinguishing forest fires within said county after satisfying themselves that such expenses were legitimate and proper. (1921, c. 26; 1925, c. 122, s. 22.)

**§ 6140 (b). Instructions on forest preservation.**

It shall be the duty of all district, county, township wardens, and all deputy wardens provided for in this chapter to distribute in all of the public schools and high schools of the county in which they are serving as such fire wardens all such tracts, books, periodicals and other literature that may, from time to time, be sent out to such wardens by the State and Federal forestry agencies touching or dealing with forest fires and forest preservation.

It shall be the duty of the various wardens herein mentioned under the direction of the State Forester, and the duty of the teachers of the various schools, both public and high schools, to keep posted at some conspicuous place in the various classrooms of the school buildings such appropriate bulletins and posters as may be sent out from the forestry agencies herein named for that purpose and keep the same constantly before their pupils; and said teachers and wardens shall prepare lectures or talks to be made to the pupils of the various schools on the subject of forest fires, their origin and their destructive effect on the plant life and tree life of the forests of the State, and



shall be prepared to give practical instruction to their pupils from time to time and as often as they shall find it possible so to do. (1925, c. 61, s. 3.)

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## CHAPTER 102.

### HISTORICAL COMMISSION

#### ART. 1. CREATION AND GENERAL POWERS

##### § 6142. Duties of commission.

It is the duty of the commission to have collected from the files of old newspapers, court records, church records, private collections, and elsewhere, historical data pertaining to the history of North Carolina and the territory included therein from the earliest times; to have such material properly edited, published by the state printer as other state printing, and distributed under the direction of the commission; to care for the proper marking and preservation of battlefields, houses, and other places celebrated in the history of the state; to diffuse knowledge in reference to the history and resources of North Carolina; to encourage the study of North Carolina history in the schools of the state, and to stimulate and encourage historical investigation and research among the people of the state; to make a biennial report of its receipts and disbursements, its work and needs, to the governor, to be by him transmitted to the general assembly. (Rev., ss. 4540, 4541; 1907, c. 714, s. 2; 1911, c. 211, s. 6; 1925, c. 275, s. 6.)

**Editor's Note.**—A proviso limiting the amount to be expended in any biennium to five thousand dollars, was omitted by the Acts of 1925.

##### § 6146.

(Repealed: 1925, c. 275, s. 6.)

#### ART. 2. LEGISLATIVE REFERENCE LIBRARY

##### § 6150.

(Repealed: 1925, c. 275, s. 6.)

## CHAPTER 103.

**HOSPITALS FOR THE INSANE**

## ART. 1. ORGANIZATION AND MANAGEMENT

**§ 6159 (a). Management of certain charitable institutions by boards of trustees; appointment; quorum; term of office.**

Each of the following charitable institutions of the State, to wit: The State Hospital at Morganton; the State Hospital at Raleigh; the State Hospital at Goldsboro, and the Caswell Training School at Kinston shall be under the management of a board of nine (9) directors or trustees to be appointed by the Governor, no two (2) of whom shall be residents of the same county. Within thirty days from March 10, 1925, the Governor shall appoint five (5) directors and within six months from March 10, 1925, the Governor shall appoint four (4) directors. At the time of making the appointment, the Governor shall designate which members of the present board are to be succeeded by his appointees. The terms of office of said directors or trustees shall be four years from the date of appointment. All vacancies shall be filled by the Governor. The Governor shall transmit to the Senate at the next session of the General Assembly the names of the persons appointed by him for confirmation. Five directors shall constitute a quorum, except when three are by law empowered to act for special purposes. (1921, c. 183, s. 2; 1925, c. 306, s. 3.)

**Editor's Note.**—The directors were divided into three classes appointed at intervals of two years, for a term of six years, prior to the Act of 1925. They are all appointed for four years now and are appointed during the same year. For removal of the officers provided for in this section see section 5912(h).

**§ 6163 (a). Delivery of inmates to Federal agencies.**

The directors and superintendents of the State Hospital at Raleigh and the State Hospital at Goldsboro are hereby authorized, empowered and directed to transfer and deliver to the United States Veterans Bureau or other appropriate department or bureau of the United States Government or to the representatives or agents of such Veterans Bureau or other department or bureau of said government, all insane inmates or prisoners, being soldiers or sailors who have served at any time in any branch of the military or naval forces of the United States, who are now in or may hereafter be committed to said hospitals. And said directors and superintendents shall take from such Veterans Bureau or other department or bureau of said government, or its duly accredited representatives or agents, receipts of acknowledgments showing the delivery of such inmates or prisoners so transferred to the United States Government for the pur-



pose of treatment under the laws and regulations of said government with respect to insane persons who have served in the military or naval forces of the United States. (1925, c. 51, s. 1.)

### **§ 6163 (b). Transfer of inmates to general wards.**

The directors and superintendents of the State Hospital at Raleigh and the State Hospital at Goldsboro are hereby authorized, empowered and directed to transfer from the wards in said hospitals set apart for the dangerous insane to the general wards any of the inmates or prisoners therein who, in the judgment of said directors and superintendents, have reached such a state of improvement in their mental condition as to justify such transfer. (1925, c. 51, s. 2.)

## **ART. 3. ADMISSION OF PATIENTS**

### **§ 6191. Clerk to issue order for examination.**

**Failure to Comply Evidence of Negligence.**—Omission to perform the material requirements of a statute in application to the clerk of the Superior Court for the commitment of one to the insane asylum, such as the personal examination of the person sought to be committed, etc., is some evidence in her action to recover damages for a wrongful conspiracy against her to deprive her of her liberty, etc., to be considered on the question of the observance by the defendants of a duty required of them; and it constitutes reversible error for the trial judge to instruct the jury that the element of negligence was not to be considered by them in arriving at their verdict upon the issue. *Getsinger v. Corbell*, 188 N. C. 553, 125 S. E. 180.

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## **CHAPTER 106.**

## **INSURANCE**

### **Subchapter I. Insurance Department**

#### **ART. 2. INSURANCE COMMISSIONER**

### **§§ 6267, 6268. Allowance for expenses.**

(Repealed: 1925, c. 275, s. 6.)

### **§ 6277. Investigation of charges.**

Upon complaint being filed by a citizen of this state that a company authorized to do business in the state has violated any of the provisions of this chapter, the insurance commissioner shall diligently investigate the matter, and, if necessary, examine, under oath, by himself or his accredited representative, at the head office located in the United States, the president and such other officer or agents of such companies as may be deemed proper; also all books, records, and

papers of the same. He or his deputies shall have power to summon witnesses, and to compel them to appear before him, or either of them, and to testify under oath in relation to any matter which is, by the provisions of this law, a subject of inquiry and investigation, and may require the production of any book, paper, document, or other matter whatsoever deemed pertinent or necessary to such inquiry with the same force and effect as is possessed by courts of record in this state. (Rev., s. 4694; 1899, c. 54, s. 111; 1903, c. 438, s. 11; 1921, c. 136, s. 4; 1925, c. 275, s. 6.)

**Editor's Note.** — By the Act of 1925, a provision for an annual appropriation was omitted.

### ART. 3. GENERAL REGULATIONS FOR INSURANCE

#### § 6289. Statements in application not warranties.

**What Constitutes Material Fact.**—Construing this section it is held that every fact untruly asserted or wrongfully suppressed must be regarded as material if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium. *Washington Life Ins. Co. v. Box Co.*, 185 N. C. 543, 546, 117 S. E. 785.

"The false representation of the relationship between insured and beneficiary was, as a matter of law, immaterial." *Howell v. American Nat. Ins. Co.*, 189 N. C. 212, 126 S. E. 603, 606.

The authorities seem to be to the effect that statement of relationship, certainly in the absence of allegation and proof to the contrary, is not material. *Howell v. American Nat. Ins. Co.*, 189 N. C. 212, 126 S. E. 603, 607.

**Same.—When Question of Law or Fact.**—"Whether or not the statement of relationship between insured, who procured the policy upon his own life, and paid the premiums thereon, designating as beneficiary, in case of death, one who had no present insurable interest in his life, and such beneficiary was material under the facts of this case, is a question of law." *Howell v. American Nat. Ins. Co.*, 189 N. C. 212, 126 S. E. 603, 605.

"But whether a representation is material or not is not always a question of law. It is sometimes a question of fact or rather, like the question of negligence, or reasonable time, a mixed question of law and fact. Where there is a controversy as to the facts, or where, upon the facts admitted or found by the jury, the court cannot hold that knowledge or ignorance of them, upon all the facts in the particular case, would or would not naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premiums, an appropriate issue, should be submitted to the jury, in order that they may, upon competent evidence, determine whether or not the representation was material." *Howell v. American Nat. Ins. Co.*, 189 N. C. 212, 126 S. E. 603, 605.

**Fraternal Benefit Association.**—Section 6491, amended by ch. 46, Laws 1913, groups benevolent life insurance companies providing death benefits in excess of \$300, in any year to any one person, as fraternal benefit associations, and those of \$300 or less, as fraternal orders, and to the former, sec. 6492, relating to fraternal orders, does not apply, and hence fraternal benefit associations fall within the provision of this section that statements of descriptions in the application for the policy are deemed representations and not warranties, which will not avoid a recovery, when untrue, unless material. *Gay v. Woodmen of the World*, 179 N. C. 210, 102 S. E. 195.



**§ 6302. Resident agents required; discrimination.**

All business done in this state by steam-boiler, liability, accident, health, live-stock, marine, leakage, credit, plate-glass, and fidelity insurance companies shall be by their regularly authorized agents residing in the state, or transacted through applications of such agents; and all policies so issued must be countersigned by such agents, who may pay not exceeding [fifty per centum of the regular commissions allowed on] the premiums collected on such business to a licensed nonresident broker. [It shall be unlawful for any salaried officer, manager, or other representative of any company, unless a bona fide resident agent, to do or perform for or on behalf of his company any act which by the insurance laws of this State is required to be performed by a licensed resident agent. It shall be unlawful for the Insurance Commissioner to license as a resident agent any person unless he is fully satisfied that such a person is a bona fide resident of this State, and is not being licensed for the purpose of evading the resident agent's law.] No such companies nor their agents may make any discrimination in favor of individuals or insurance, and the provisions hereafter set forth in this chapter with respect to discrimination by life insurance companies shall apply to the companies above named and their agents. (Rev., s. 4810; 1899, c. 54, ss. 107, 108; 1903, c. 438, s. 11; 1911, c. 196, s. 5; 1913, c. 140, s. 3; 1921, c. 136, s. 3; 1925, c. 70, s. 1.)

**ART. 4. DEPOSIT OF SECURITIES****§ 6316 (a). Registration of bonds deposited in name of treasurer.**

The Insurance Commissioner is hereby empowered, upon the written consent of any insurance company depositing with the Insurance Commissioner or the State Treasurer under any law of this State, any state, county, city or town bonds or notes which are payable to bearer, to cause such bonds or notes to be registered as to the principal thereof in lawful books of registry kept by or in behalf of the issuing state, county, city or town, such registration to be in the name of the Treasurer of North Carolina in trust for the company depositing the notes or bonds and the State of North Carolina, as their respective interest may appear, and is further empowered to require of any and all such companies the filing of written consent to such registration as a condition precedent to the right of making any such deposit or right to continue any such deposit heretofore made. (1925, c. 145, s. 2.)

**§ 6316 (b). Notation of registration; release.**

Bonds or notes so registered shall bear notation of such registration on the reverse thereof, signed by the registering officer or agent, and may be released from such registration and may be transferred on such books of registry by the signatures of the State Treasurer. (1925, c. 145, s. 3.)

**§ 6316 (c). Expenses of registration.**

The necessary expenses of procuring such registration and any transfer thereof shall be paid by the company making the deposits. (1925, c. 145, s. 4.)

**Subchapter II. Insurance Companies****ART. 6. GENERAL DOMESTIC COMPANIES****§ 6334. Investment of capital.**

Such capital shall be invested only as follows :

1. In first mortgage of real estate in this state.
2. In bonds of the United States or of any of the states whose bonds do not sell for less than par.
3. In the bonds or notes of any city, county, or town of this state whose net indebtedness does not exceed five per centum of the last preceding valuation of the property therein for purposes of taxation. The term "net indebtedness" excludes any debt created to provide an electric light plant and equipment, sewerage system, and a supply of water for general domestic use, and allows credit for the sinking fund of a county, city, town, or district available for the payment of its indebtedness.
4. Any insurance company having a capital stock of more than one hundred thousand dollars may, with the consent of the insurance commissioner, after investing one hundred thousand dollars of the capital as provided in this section, invest the balance in such other securities or in such safe manner as may be approved by the commissioner.
5. Any real-estate title insurance company organized for any of the purposes set forth in article fourteen of this chapter, and having a capital stock of more than fifty thousand dollars, may, with the consent of the insurance commissioner, after investing fifty thousand dollars of the capital, as provided in this section, invest the balance thereof [in any such other securities including preferred stock in solvent corporations and including a reasonable investment not to exceed one-fourth of the total capital stock in abstract or title plants] and no such company shall guarantee or insure in any one risk more than forty per cent of its combined capital and surplus without first having the approval of the insurance commissioner of North Carolina, which approval shall be endorsed upon the policy. If the capital stock of such company does not exceed fifty thousand dollars, it may, with the consent of the insurance commissioner, after having invested three-fourths of its capital stock as now provided by law, invest the balance hereof in abstracts of titles of property situated in one or more of the cities or counties of this state. (Rev., s. 4731; 1899, c. 54, s. 27; 1907, c. 798; 1907, c. 998; 1911, c. 32; 1913, c. 200; Ex. Sess. 1920, c. 54; 1923, c. 73; 1925, c. 187.)



## ART. 10. BOND AND INVESTMENT COMPANIES

## § 6367. Contract in writing; stipulations required.

**Remedial Character.**—This section is for the protection of the people of this State in being solicited for the purchase of shares of stock in certain classes of corporations, is remedial in its effect, and will be construed to advance the remedy. *Seminole Phosphate Co. v. Johnson*, 188 N. C. 419, 124 S. E. 859.

**Language Construed to Effectuate Intent.**—The language used in the codification will be construed to effectuate the intent and meaning of the statutes so codified, when this may be done by a reasonable construction. *Seminole Phosphate Co. v. Johnson*, 188 N. C. 419, 124 S. E. 859.

**Applicable to Domestic Corporations.**—The requirements of this section apply by statutory amendment of 1919, not only to corporations formed in other states, but also to domestic corporations. C. S., 8107. *Seminole Phosphate Co. v. Johnson*, 188 N. C. 419, 124 S. E. 859.

**Competency of Evidence.**—Upon the defense in an action upon a note for illegality in its procurement for a purchase of stock solicited in violation of the Blue-Sky Law it is competent to show by a witness that he had also been solicited under like circumstances by the agent of the same party. *Seminole Phosphate Co. v. Johnson*, 188 N. C. 419, 124 S. E. 859.

Where fraud in the procurement of a note given for shares of stock in a corporation is alleged in an action thereon, by an endorsee, claiming to be a bona fide holder in due course, etc., it is competent for the defendant to show by his evidence that the stock salesman representing the corporation had induced him to make the note by misrepresentations of the company's solvency, and that he was solicited in violation of the "Blue-Sky Law" (this section), and the endorsee's connection with the corporation and his evident previous knowledge of the fraud alleged to have been perpetrated; and, also, that the stock salesman had made similar misrepresentations to other purchasers of the stock under the same conditions. *Bank v. Sherron*, 186 N. C. 297, 119 S. E. 497.

**Questions for the Jury.**—Where there is evidence tending to show that the defendant had given his note sued on for shares of stock solicited by the plaintiff in violation of the provision of this section (The Blue-Sky Law), it raises an issue for the determination of the jury, and it is reversible error for the court to hold, as a matter of law, that the plaintiff should recover. *Seminole Phosphate Co. v. Johnson*, 188 N. C. 419, 124 S. E. 859.

Where a bank has acquired a negotiable instrument procured by fraud and in violation of a criminal statute, in this case the Blue-Sky Law, evidence that some of the officers of the bank had acted in selling the notes on commission, and others thereof upon the loaning committee had knowledge of the illegality of the corporation in soliciting the sale of shares of stock for which the notes were given, is sufficient to take case to the jury in defense of an action upon the notes. *Planters Bank, etc., Co. v. Felton*, 188 N. C. 384, 124 S. E. 894.

**Where Note Voidable Only.** — Where a note is given for shares of stock, sold in violation of the Blue-Sky Law, this section, it is voidable only, and a recovery may be had thereon by a purchaser for value in due course, in good faith, without notice of the illegality of the instrument. *Planters Bank, etc., Co. v. Felton*, 188 N. C. 384, 124 S. E. 894. *Bank v. Hunt*, 188 N. C. 377, 124 S. E. 854.

**Same—Where Holder Has Notice.**—Where a negotiable note is given for shares of stock in a corporation, solicited in violation of the Blue-Sky Law, the note is voidable against a holder who has acquired it with notice of the illegality or fraud in the procurement of the instrument. *Planters Bank, etc., Co. v. Felton*, 188 N. C. 384, 124 S. E. 894.

**§ 6373. Statements filed; accounts kept.**

Every company shall, on or before the first day of March, file with the insurance commissioner a statement as of the thirty-first day of December preceding, in such form as required by him, and such other statements and information shall be filed in such form and within such time as may be required by the commissioner. The accounts of such company shall be kept in such form and within such time as may be required by the commissioner. (1913, c. 156, s. 1 (9); 1923, c. 180, s. 2; 1924, c. 53.)

**Editor's Note.**—The Act of 1924, repealed the amendatory Act of 1923 thus restoring the section to the form in which it appeared in Volume Two of the Consolidated Statutes.

**Subchapter III. Fire Insurance**

**ART. 17. GENERAL REGULATIONS OF BUSINESS**

**§ 6430. Licensed agents not to pay commissions to non-resident or unlicensed persons.**

Any person, firm, or corporation licensed by the insurance commissioner to act as a fire insurance agent in this state is prohibited from paying directly or indirectly any commission, brokerage, or other valuable consideration on account of any policy covering property in this state, to any person, firm, or corporation who is a nonresident of the state, or to any person, firm, or corporation not duly licensed by the insurance commissioner as a fire insurance agent; but a fire insurance agent licensed in the state may pay a commission not exceeding [fifty per centum of the regular commissions allowed upon the issuance of such policies] to a licensed non-resident broker. The insurance commissioner is authorized to license a non-resident as a broker when he applies therefor on a proper blank of the department and makes affidavit that he will not during the fiscal year place directly or indirectly any fire insurance on any property located in North Carolina except through licensed resident agents of the state, [that he is a broker in good faith and proposes to hold himself out as such.] The fee for this license and seal is ten dollars. (Rev., s. 4766; 1903, c. 488, s. 2; 1905, c. 170, s. 2; 1923, c. 4, s. 70; 1925, c. 70, s. 6.)

**ART. 18. FIRE INSURANCE POLICIES**

**§ 6435. Items to be expressed in policies; agent to inspect risks.**

[Upon request] there shall be printed, stamped, or written on each fire policy issued in this state the basis rate, deficiency charge, the credit for improvements, and the rate at which written, and whenever a rate is made or changed on any property situated in this state [upon request] a full statement thereof showing in detail the basis rate, deficiency charges and credits, as well as rate proposed to be made, shall be delivered to the owner or his representative having the



insurance on the property in charge, by the company, association, their agent or representative, with a notice to the effect that the rate is promulgated and filed with the insurance department. Every agent of a fire insurance company shall, before issuing a policy of insurance on property situated in a city or town, inspect the same, informing as to its value and insurable condition. (1915, c. 109, s. 3; 1925, c. 70, s. 3.)

### **§ 6436. Standard policy adopted.**

No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form filed in the office of the insurance commissioner of the state, known and designated as the standard fire insurance policy of the state of North Carolina, except as follows: (a) A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the names of its officers and agents, the number and date of the policy, and if it is issued through an agent, the words: "This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at . . . . .," and after the words "Standard Fire Insurance Policy of the State of North Carolina," on the back of the form, the names of such other states as have adopted this standard form. (b) A company may use in its policies written or printed forms of description and specification of the property insured. (c) A company insuring against damage by lightning may print in the clause enumerating the perils insured against, the additional words, "also any damage by lightning, whether fire ensues or not," and in the clause providing for an apportionment of loss in case of other insurance, the words, "whether by fire, lightning, or both." [(c-1) A company insuring against damage by windstorm, cyclones and tornadoes may print in the clause enumerating the perils insured against, the additional words, 'also any damage by windstorm, cyclones and tornadoes, whether fire ensues or not,' and in the clause providing for apportionment of loss in case of other insurance, the words, 'whether by fire, windstorm, cyclones, tornadoes or all.' Such company may also print after the other conditions of the standard fire policy such provisions and conditions especially applicable to windstorms, cyclones, and tornadoes. The company may also make such change in the heading and preliminary statements of such combined policy form as may be necessary, all in such form as may be approved by the Insurance Commissioner.] (d) A company may write or print upon the margin or across the face of a policy, or write or print in type not smaller than long primer or ten point roman-faced, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form, and all such slips, riders, and provisions must be signed by the officers or agents of the company so using them. The iron safe or any similar clause requiring the taking of inventories, the keeping of books and producing the same in the adjustment of any loss, shall not be used or operative in the settlement of

losses on buildings, furniture and fixtures, or any property not subject to change in bulk and value. (e) Every mutual company shall cause to appear in the body of its policy the total amount for which the assured may be liable under the charter of the company. (f) The company may print on or in its policy, with the approval of the insurance commissioner, if the same is not already included in such standard form, any provision which any such corporation is required by law to insert in its policies not in conflict with the provisions of such standard form. Such provisions shall be printed apart from the other provisions, agreements, or conditions of the policy, under a separate title, as follows: "Provisions Required by Law to be Inserted in This Policy." (Rev., s. 4759; 1899, c. 54, s. 43; 1901, c. 391, s. 4; 1907, c. 800, s. 1; 1915, c. 109, s. 10; 1925, c. 70, s. 5.)

**Waiver of Requirements.**—An insurance agent owes no duty to inquire into the fact of ownership, nor to explain the terms of the policy to the assured, and failure to so inquire is not waiver of sole ownership requirement in policy designated by this section as standard. *Hardin v. Liverpool & London & Globe Ins. Co.*, 189 N. C. 423, 127 S. E. 353.

### § 6437. Form of standard policy.

See notes to section 6436.

**Subrogation.**—Where the insurer against loss by fire has paid the loss to the owner of the building destroyed by the actionable negligence of another, the insurer is subrogated to the rights of the owner, both in equity and under the statutory form of the policy, described in this section, and may maintain his action against the tortfeasor and recover the amount he has so paid, covered by the policy contract; and the owner is a proper party thereto as the holder of the legal title, through whom the right of the insurer is to be enforced. *Lumberman's Mutual Ins. Co. v. Southern Ry. Co.*, 179 N. C. 255, 102 S. E. 417.

**Effect of Appraisal on Limitation.**—Under the valid provision of a standard fire insurance policy, approved by statute, the period limited to twelve months from the time of loss by fire in which an action may be maintained is not waived by the time taken under an agreement for an appraisal and award for the damage sustained by the insured. *Tatham & Co. v. Liverpool, London & Globe Ins. Co.*, 181 N. C. 434, 107 S. E. 450.

### § 6441. Additional or coinsurance clause.

No fire insurance company licensed to do business in this state may issue any policy or contract of insurance covering property in this state which shall contain any clause or provision requiring the insured to take out or maintain a larger amount of insurance than that expressed in such policy, nor in any way provide that the insured shall be liable as a co-insurer with the company issuing the policy for any part of the loss or damage which may be caused by fire to the property described in such policy, and any such clause or provision shall be null and void, and of no effect: Provided, the coinsurance clause or provision may be written in or attached to a policy or policies issued when [there is stamped on the face of such policy the words "coinsurance contract." The rate for the insurance with and without the coinsurance clause shall be furnished the owner upon request.] (1915, c. 109, s. 5; 1925, c. 70, s. 4.)



## Subchapter IV. Life Insurance

### ART. 21. GENERAL REGULATIONS OF BUSINESS

#### § 6457. Soliciting agent represents the company.

**Liability for Agents Torts.**—The soliciting agent of a life insurance company, who is also charged with the duty to deliver the policy to the applicant, is the agent of the company, and makes it liable for its agent's tort in failing to deliver it within a reasonable time after its receipt by him from his principle for that purpose. *Fox v. Life Ins. Co.*, 185 N. C. 121, 116 S. E. 266.

#### § 6460. Medical examination required.

No life insurance company organized under the laws of or doing business in this state shall enter into any contract of insurance, in an amount [in excess of two thousand] dollars, upon lives within this state without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner. [*Provided*, that where there has been no medical examination the policy shall not be rendered void, nor shall payment be resisted on account of any misrepresentation as to the physical condition of the applicant, except in case of fraud. This section shall not apply to contracts of insurance issued under the group plan.] (Rev., s. 4779; 1899, c. 54, s. 58; 1903, c. 438, s. 5; 1919, c. 186, s. 5; 1925, c. 82.)

#### § 6466 (a). Definition of group life insurance.

Group life insurance is hereby declared to be that form of life insurance covering not less than fifty employees with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly, and insuring only all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer: *Provided, however*, that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured. (1925, c. 58, s. 1.)

#### § 6466 (b). Standard provisions for policies of group life insurance.

No policy of group life insurance shall be issued or delivered in this State unless and until a copy of the form thereof has been filed with the Insurance Commissioner and formally approved by him; nor shall such policy be so issued or delivered unless it contains in substance the following provisions:

(a) A provision that the policy shall be incontestable after two years from its date of issue, except for nonpayment of premium and

except for violation of the conditions of the policy relating to military or naval service in time of war.

(b) A provision that the policy, the application of the employer and the individual applicants, if any, of the employees insured, shall constitute the entire contract between the parties, and that all statements made by the employer or by the individual employees shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall be used in defense to a claim under the policy, unless it is contained in a written application.

(c) A provision for the equitable adjustment of the premiums or the amount of insurance payable in the event of a misstatement in the age of the employee.

(d) A provision that the company will issue to the employer for delivery to the employee, whose life is insured under such policy, an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom payable, together with provision to the effect that in case of the termination of the employment for any reason whatsoever the employee shall be entitled to have issued to him by the company, without evidence of insurability, and upon application made to the company within thirty-one days after such termination, and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the company, except term insurance, in an amount equal to the amount of his protection under such group insurance policy at the time of such termination.

(e) A provision that to the group or class thereof originally insured shall be added from time to time all new employees of the employer eligible to insurance in such group or class.

Except as provided in this chapter it shall be unlawful to make a contract of life insurance covering a group in this State. Policies of group life insurance, when issued in this State by any company not organized under the laws of this State, may contain, when issued, any provision required by the law of the state territory, or district of the United States under which the company is organized; and policies issued in other states or countries by companies organized in this State, may contain any provision required by the laws of the State, territory, district or county in which the same are issued, anything in this section to the contrary notwithstanding. Any such policy may be issued or delivered in this State which in the opinion of the Insurance Commissioner contains provisions on any one or more of the several foregoing requirements more favorable to the employer or to the employee than hereinbefore required. (1925, c. 58, s. 2.)

### **§ 6466 (c). Voting power under policies of group life insurance.**

In every group policy issued by a domestic life insurance company, the employer shall be deemed to be the policyholder for all purposes



within the meaning of this chapter, and, if entitled to vote at meetings of the company, shall be entitled to one vote thereat. (1925, c. 58, s. 3.)

### § 6466 (d). Exemption from execution.

No policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other who may have a right thereunder, either before or after payment; nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute a part of the estate of the employee for the payment of his debts. (1925, c. 58, s. 4.)

## Subchapter VI. Fraternal Orders and Societies

### ART. 25. FRATERNAL ORDERS

#### § 6491. General insurance law not applicable.

**Representations.**—This section amended by ch. 46, Laws 1913, groups benevolent life insurance companies providing death benefits in excess of \$300, in any year to any one person, as fraternal benefit associations, and those of \$300 or less, as fraternal orders, and to the former, sec. 6491, relating to fraternal orders, does not apply, and hence fraternal benefit associations fall within the provision of sec. 6289, that statement of descriptions in the application for the policy are deemed representations and not warranties, which will not avoid a recovery, when untrue, unless material. *Gay v. Woodmen of the World*, 179 N. C. 210, 102 S. E. 195.

### ART. 26. FRATERNAL BENEFIT SOCIETIES

#### § 6508. Beneficiaries.

**Change of Beneficiary.**—Where a policy was originally payable to the wife, and later the name of a woman not the lawful wife is substituted, such substitution is invalid under this section, and the lawful wife will be entitled to the proceeds of the policy. *Andrews v. Grand Lodge (N. C.)*, 128 S. E. 4.

**Same—Policies in Force Before Passage.**—This section may validly be applied to policies in force before its passage so as to prevent the substitution for the wife of a beneficiary not within the class specified in the section. *Andrews v. Grand Lodge (N. C.)*, 128 S. E. 4.

#### § 6510. Benefits not subject to debts.

No money or other benefit, charity or relief or aid to be paid, provided, or rendered by any such society [or society or association for the relief of employees including railroad and other relief associations] shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary or any other person who may have a right, thereunder, either before or after payment. (1913, c. 89, s. 18; 1925, c. 83.)

**§ 6518. Certain societies not included.**

Nothing contained in this article shall be construed to affect or apply to societies which limit their membership to any hazardous occupation, nor to an association of local lodges of a society now doing business in this state which provides death benefits not exceeding five hundred dollars to any one person or disability benefits not exceeding three hundred dollars in any one year to any one person, or both, nor to any contracts of reinsurance business on such plan in this state, nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation, nor to domestic lodges, orders, or associations of a purely religious, charitable, and benevolent description, which do not provide for a death benefit of more than one hundred dollars, or for disability benefits of more than one hundred and fifty dollars to any one person in any one year. The insurance commissioner may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this article. (1913, c. 89, s. 26; 1925, c. 70, s. 2.)

**Editor's note.**—By the Act of 1925, a clause exempting from the operation of this article "similar societies which do not issue insurance certificates" was omitted.

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**CHAPTER 107****INTERNAL IMPROVEMENTS****§§ 6538-6553. Board of internal improvements; duties and powers.**

(Repealed: Act 1925, c. 89, s. 23.)

**§ 6553 (a). Governor and council to control internal improvements.**

The Governor and Council of State shall have charge of all the State's interest in all railroads, canals and other works of internal improvements. (1925, c. 157, s. 1.)

**§ 6553 (b). State deemed shareholder in corporation accepting appropriation.**

When an appropriation is made by the State to any work of internal improvement conducted by a corporation, the State shall be considered, unless otherwise directed, a stockholder in such corporation, and shall have as many shares as may correspond with the amount of money appropriated; and the acceptance of such money shall be deemed to be a consent of the corporation to the terms herein expressed. (1925, c. 157, s. 2.)



**§ 6553 (c). Report of railroad; contents.**

The president or other chief officer of every railroad, canal, or other public work of internal improvement in which the State owns an interest, shall, when required to do so by the Governor, make or cause to be made to the Governor and Council of State a written report of its affairs. This report shall show:

1. Number of shares owned by the State.
2. Number of shares owned otherwise.
3. Face value of such shares.
4. Market value of each of such shares.
5. Amount of bonded debt, and for what purpose contracted.
6. Amount of other debt, and how incurred.
7. If interest on bonded debt has been punctually paid as agreed; if not, how much in arrears.
8. Amount of gross receipts for past year, and from what sources derived.
9. An itemized account of expenditures for past year.
10. Any lease or sale of said property, or any part thereof, to whom made, for what consideration, and for what length of time.
11. Suits at law pending against his company concerning its bonded debt, or in which title to all or any part of such road or canal is concerned.
12. Any sales of stock owned by the State, by whose order made, and disposition of the proceeds.

Any person failing to report as required by this section shall be guilty of a misdemeanor and be fined or imprisoned at the discretion of the court. (1925, c. 157, s. 3.)

**§ 6553 (d). Report to general assembly; contents.**

The Governor and Council of State shall biennially report to the General Assembly.

1. The condition of all railroads, canals, or other works of internal improvement in which the State has an interest, and they shall at the same time suggest such improvement, enlargement, or extension of such work as they shall deem proper, and such new works of similar nature as shall seem to them to be demanded by the growth of trade or the general prosperity of the State.

2. The amount, condition, and character of the State's interest in other railroads, roads, canals, or other works of internal improvement in which the State has taken stock, to which she has loaned money, or whose bonds she holds as security.

3. The condition of such roads or other corporate bodies, in detail, as are referred to in the previous section, giving their entire financial condition, the amount and market value of the stock, receipts and disbursements for the previous year or since the last report; the amount of real and personal property of such corporations, its esti-

mated value, and such suggestions with regard to the State's interest in the same as may to them seem warranted by the status of the roads or corporations.

4. The names of all persons failing or refusing to report as is required by law. (1925, c. 157, s. 4.)

**§ 6553 (e). Approval of encumbrance on state's interest in corporations.**

No corporation or company in which the State has or owns any stock or any interest shall sell, lease, mortgage, or otherwise encumber its franchise, right of way, or other property, except by and with the approval and consent of the Governor and Council of State. (1925, c. 157, s. 5.)

**§ 6553 (f). Appointment of proxies, etc.**

The Governor shall appoint on behalf of the State all such officers or agents as, by any act, incorporating a company for the purpose of internal improvement, are allowed to represent the stock or other interests which the State may have in such company; and such person or persons shall cast the vote to which the State may be entitled in all the meetings of the stockholders of such company under the direction of said Governor; and the said Governor may, if in his opinion the public interest so requires, remove or suspend such persons, officers, agents, proxies, or directors in his discretion. (1925, c. 157, s. 6.)

**§ 6553 (g). Power of investigation of corporations.**

The Governor and Council of State shall have the power to investigate the affairs of any corporation or association described in section three of this act, and may require the Attorney-General or the Corporation Commission to assist in making such investigation under the rules and regulations prescribed in chapter twenty-two of the Consolidated Statutes of one thousand nine hundred and nineteen. (1925, c. 157, s. 7.)

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## CHAPTER 109

### LIBRARIES

#### ART. 1. STATE LIBRARY

**§ 6587. Appropriation.**

(Repealed: 1925, c. 275, s. 6.)

**§ 6587 (a). Members of state boards and commissions to use books.**

That any member of a State board or commission residing in Raleigh be allowed the privilege of borrowing from the State Library,



material, books or other publications, except reference books, and enjoy the same privileges in respect thereto as is allowed State officials. (1925, c. 115.)

## ART. 2. LAW LIBRARY

### § 6591. Appropriation.

The clerk of the supreme court, under the direction of the justices of that court, is authorized and directed to expend annually the amount paid in by applicants for license to practice law, who are examined by the court, in the purchase of such books as may be necessary to keep the law library well appointed, and no other appropriation shall be allowed for that purpose. (Rev., s. 5086; Code, s. 3613; res., 1872-3; 1925, c. 275, s. 6.)

**Editor's Note.**—By the Act of 1925, a provision for the expenditure of \$200 for the binding of books was omitted.

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## CHAPTER 110

## MEDICINE AND ALLIED OCCUPATIONS

### ART. 3. PHARMACY

### § 6667. Selling drugs without license prohibited; drug trade regulated.

It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this article. [*Provided*, that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug store or chemical store, a licensed assistant pharmacist may conduct or have charge of said store]. And it shall be unlawful for any owner or manager of a pharmacy or drug store or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist.

Nothing in this section shall be construed to interfere with any

legally registered practitioner of medicine in the compounding of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of nonpoisonous domestic remedies, nor with the sale of patent or proprietary preparations which do not contain poisonous ingredients, [nor with the sale of paregoric, Godfrey's Cordial, Aspirin, alum, borax, bicarbonate of soda, calomel tablets, castor oil, compound carthartic pills, copperas, cough remedies which contain no poison or narcotic drugs, cream of tartar, distilled extract witch hazel, epsom salts, harlem oil, gum asafetida, gum camphor, glycerin, peroxide of hydrogen, petroleum jelly, saltpetre, spirit of turpentine, spirit of camphor, sweet oil, and sulphate of quinine] nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison," the vignette of the skull and crossbones, and the name of at least two readily obtainable antidotes.

In any village of not more than five hundred inhabitants the board of pharmacy may grant any legally registered practicing physician a permit to conduct a drug store or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than five hundred: *Provided*, that the board of pharmacy may, after due investigation, grant to any legally registered practicing physician in towns or villages of more than five hundred, and not exceeding six hundred, inhabitants a permit to conduct a drug store or pharmacy in such towns or villages subject to the provisions of this article. [The part of the section in brackets shall not apply to any city or town where there is located an established drug store, except in the counties of McDowell and Onslow]. (Rev., s. 4487; 1905, c. 108, s. 4; 1921, c. 68, s. 6; 1924, c. 116.)

### ART. 3. A. REGULATION OF DRUGS

#### § 6683 (a). Drugs defined.

Except as limited in section two of this article, the word "drug" as used in this article shall be construed to include (a) opium, (b) coca leaves, or (c) any compound or derivative of opium or coca leaves, or (d) any substance or preparation containing opium or coca leaves, or (e) any substance or preparation containing any compounds or derivatives of opium or coca leaves. (1925, c. 276, s. 1.)

#### § 6683 (b). Excepted substances.

The word "drug" shall not be construed to include (1) preparations and remedies and compounds which do not contain more than two grains of opium or more than one-fourth of a grain of morphine



or more than one-eighth of a grain of heroin or more than one grain of codeine or any salt or derivative of any of them in any one fluid ounce, if the same is a liquid; or if a solid or a semi-solid in one avoirdupois ounce; (2) liniments, ointments or other preparations prepared and dispensed in good faith for external use only, providing such liniments, ointments or other preparations do not contain cocaine or any of its salts, alpha or beta eucaine or any of their salts or any synthetic substitutes for cocaine or eucaine or their salts. (3) Decocainized coca leaves or preparations made therefrom or other preparations of coca leaves which do not contain cocaine; but such preparations for external use only must contain ingredients rendering same unfit for internal administration: *Provided, however*, that this shall not apply to camphorated tincture of opium (paregoric) prepared according to the United States pharmacopoeia standard and containing not quite two grains of opium to a fluid ounce: *Provided, however*, that no preparations, remedies, or compounds containing any opium or coca leaves or any compound or derivatives thereof in any quantity whatsoever may be sold, dispensed, distributed or given away for the use of any known habitual user of drugs or any child of twelve years of age or under, except in pursuance of a written prescription of a duly licensed physician or dentist in the course of his professional practice, and when said drugs are dispensed or administered to the patient for legitimate medical purpose. (1925, c. 276, s. 2.)

### **§ 6683 (c). Prescribing drugs for habitual users.**

No physician or dentist shall sell, dispense, administer, distribute, give or prescribe any of said drugs to any person known to such physician or dentist to be an habitual user of any of said drugs, unless said drug is prescribed, administered, dispensed or given for the cure or treatment of some malady other than the drug habit or administered, dispensed, given or prescribed for the treatment of a bona fide patient suffering from cancer or other incurable disease, and the name of such patient, his or her age, name and address shall within five days thereafter be reported by the physician so administering, giving or prescribing such drugs to the county health officer of the county in which the patient resides, and if there be no county health officer in such county, then to the secretary of the Board of Health of this State. And in every such case the physician so administering, prescribing or giving such drug shall himself make a physical examination of the patient to whom or for whom such drug is administered, dispensed, given or prescribed, together with a diagnosis of the case and the amount and nature of the drug prescribed or dispensed in the first treatment. When the patient leaves his care such physician shall report in writing the same to the said officer of the county or local board of health and to the secretary of the State Board of Health when there is no county or local health officer the result of the said treatment. (1925, c. 276, s. 3.)

**§ 6683 (d). Treatment of addicts.**

This article shall not be construed to apply to the treatment of habitual users of drugs in public State hospitals, State sanatoriums, county homes, prisons or other public institutions, except that all such public institutions, except State hospitals at Raleigh, shall render an annual report to the State Department of Health, giving therein the names, addresses, ages, clinical conditions and results of treatment of all habitual users of drugs given treatment in such State institutions. For the purpose of enforcing the provisions of this article the State Board of Health and its inspectors and officers shall have the right at any time and from time to time to examine any or all records required by this article to be kept, but this shall not be construed to exclude duly constituted authorities of this State from enforcing the provisions of this article. (1925, c. 276, s. 4.)

**§ 6683 (e). "Person" defined; prescription.**

The word "person" as used in this act shall be construed to include an individual, a copartnership, a corporation or an association. Masculine words include feminine or neuter. The singular includes the plural. The word "prescription" shall be construed to designate a written order by duly licensed physician, dentist or veterinarian calling for a drug or any substance or preparation containing a drug. (1925, c. 276, s. 5.)

**§ 6683 (f). Possession, sale, etc., of drugs; exceptions.**

No person shall have in his possession or under his control or deal in, dispense, sell or deliver, distribute, prescribe, traffic in or give away any of said drugs. But this section does not apply in the regular course of their business, profession, employment, occupation or duties to (a) manufacturers of drugs, (b) persons engaged in the wholesale drug trade, (c) importers or exporters of drugs, (d) registered pharmacists actually engaged as retail druggists, (e) bona fide owners of pharmacies or drug stores, (f) licensed physicians, (g) licensed dentists, (h) licensed veterinarians, (i) persons in the employ of the United States or of this State or of any county, township or municipality having such drug in their possession by reason of their official duties, (j) warehousemen or common carriers engaged bona fide in handling or transporting drugs, (k) persons regularly in charge of drugs in hospitals, State asylums, State sanatoriums, county homes, jails, penitentiaries or public institutions, (l) registered nurses under the immediate supervision and direction of the attending physician, (m) persons in charge of the laboratory where such drugs are used for medical or scientific research, (n) persons other than habitual users of such drugs having such drugs in their possession for their own personal use: *Provided*, they have obtained the same in good faith for their own use from a duly licensed physician or dentist in pursuance of his prescription given them by duly licensed physician or dentist. (1925, c. 276, s. 6.)



**§ 6683 (g). Use of drugs.**

No person shall use, take, administer to his person, or cause to be administered to his person or administer to any other person or cause to be administered to any other person, any of the aforesaid drugs, except under the advice and direction and with the consent of a regularly practicing and duly licensed physician or dentist. (1925, c. 276, s. 7.)

**§ 6683 (h). To whom drugs sold.**

No manufacturer or producer, importer, exporter or person engaged in the wholesale drug trade and regularly selling drugs shall sell, dispense or give away any of said drugs, except to (a) a duly licensed physician, (b) duly licensed pharmacist, (c) duly licensed dentist, (d) duly licensed veterinarian, (e) manufacturer of drugs, (f) person engaged in the wholesale drug trade and regularly selling drugs, (g) exporter of drugs, (h) bona fide hospital, State dispensary, asylum or sanatorium, (i) a public institution, (j) bona fide owner of pharmacy or drug store, (k) a person in charge of a laboratory where such drugs are used for scientific and medical research only, (1) a person in the employ of the United States or this State, or any county, township or municipality thereof purchasing or receiving the same in his official capacity. And no manufacturer, producer or person engaged in the wholesale or retail drug trade shall sell, dispense or give away any of said drugs, except in pursuance of a written order signed by the person to whom such drug is sold, dispensed or given. Such order shall be preserved for a period of two years in such a way as to be open to inspection by proper authorities. (1925, c. 276, s. 8.)

**§ 6683 (i). Selling, dispensing, etc.; prescription, written order.**

No licensed physician, druggist, or bona fide owner of a pharmacy or drug store shall sell, dispense or give away any of said drugs to an individual, except in pursuance of a written prescription by a physician, dentist or veterinary, which prescription shall be dated the same day on which it is signed and shall be signed by said physician, dentist or veterinary who issued the same, and also shall not be sold, dispensed or given except also upon a written order of the person to whom sold, dispensed or given. But this section shall not be construed to prohibit sale to (a) a manufacturer of drugs, (b) persons engaged in the wholesale drug trade, (c) importers or exporters of drugs, (d) registered pharmacists actually engaged as retail druggists, (e) bona fide owners of pharmacies or drug stores, (f) licensed physicians, (g) licensed dentists, (h) licensed veterinary, (i) persons in the employ of the United States or this State or of any county, township or municipality having such drug in their possession by reason of their official duties, (j) nor delivery to warehousemen or common-carrier engaged bona fide in the handling or transporting of drugs, (k) persons regularly in charge of drugs in State dis-

pensaries, hospitals, State asylums, State sanatoriums, county homes, jails, penitentiaries or public institutions, (1) persons in charge of a laboratory where such drugs are used for medical or scientific research only, (m) persons other than habitual users of such drugs having said drugs in their possession for their own personal use: *Provided*, they have obtained same in good faith for their own use from a duly licensed physician or dentist in pursuance of a prescription duly given them by such duly licensed physician or dentist. (1925, c. 276, s. 9.)

**§ 6683 (j). Examination before prescribing; veterinary not to prescribe for human beings.**

No physician or dentist shall dispense, give or prescribe any of such drugs to or for a patient without first making a physical examination of such patient. And no veterinary shall sell, dispense, prescribe any of such drugs for human beings. (1925, c. 276, s. 10.)

**§ 6683 (k). Violation, penalties.**

The violation of any provisions of this act shall be and constitute a misdemeanor, and upon conviction thereof the person or persons, corporation or corporations, so violating the same shall be fined or imprisoned, or both, in the discretion of the court. (1925, c. 276, s. 11.)

ART. 7. TRAINED NURSES

**§ 6729. Board of examiners.**

A board of nurse examiners composed of five members, to consist of three registered nurses to be elected by the North Carolina State Nurses' Association, and one representative each from the North Carolina State Medical Society and the North Carolina State Hospital Association, is hereby created to be known by the title "The Board of Nurse Examiners of North Carolina."

Each member of said board shall serve a term of three years, or until his or her successor is appointed, except the first board elected under this article, the members of which shall be and serve as follows: For term expiring June the first, nineteen hundred and twenty-five, or until their successors are qualified, James M. Parrott, M.D., of Lenoir, and Oren Moore, M.D., of Mecklenburg; for term expiring June the first, nineteen hundred and twenty-six, until their successors are qualified, Mary P. Laxton, R.N., of Buncombe, E. A. Kelly, R.N., of Cumberland and Dorothy Conyers of Gilford. The board shall fill any vacancy for an unexpired term.

The Board of nurse examiners is hereby empowered to prescribe such regulations as it may deem proper, governing applicants for licenses; admission to examinations, the conduct of applicants during examinations, and the conduct of the examinations proper with the approval of the standardization board hereinafter created. (1917, c. 17, s. 1; 1925, c. 87, s. 2.)

**Editor's Note.**—Prior to the Act of 1925, there were two physicians on



the board elected by the State Medical Society; instead there is now one representative from the Medical Society and one from the State Hospital Association. A provision for an inspector of training schools was omitted and there is a new provision giving the board power to make rules and regulations.

### **§ 6729 (a). Committee on standardization.**

A joint committee on standardization, consisting of three members appointed from the North Carolina State Nurses' Association, and three members from the North Carolina State Hospital Association, whose members shall serve for a term of three years, or until their successors are elected, is hereby created. The joint committee on standardization shall advise with the board of nurse examiners herein created in the adoption of regulations covering applicants for license and admission to examinations, and the standardization, so far as possible, of the schools of nursing in North Carolina, and shall have the power to classify such schools with the assent of the board of nurse examiners, and prescribe rules and regulations for the classification of schools of nursing. (1925, c. 87, s. 3.)

### **§ 6729 (b). Educational director of schools of nursing.**

An educational director of schools of nursing shall be annually appointed by the North Carolina State Nurses' Association, who shall report annually to the board of nurse examiners, and to the North Carolina State Hospital Association. Such director shall be a registered nurse, her duties and compensation to be fixed by the board of nurse examiners and the standardization board. (1925, c. 87, s. 4.)

### **§ 6730. Organization of board; seal; officers; compensation.**

Three members of the board shall constitute a quorum, two of whom shall be nurses.

The board shall adopt and have custody of a seal and shall frame by-laws and regulations for its own government and for the execution of the provisions of this article. The officers of said board shall be a president and a secretary-treasurer, both to be elected from its nurse members. The treasurer shall give bond in such sum as may be fixed in the by-laws, and the premium therefor to be paid from the treasury of said board. The members of the board shall receive such compensation in addition to actual traveling and hotel expenses as shall be fixed by the board. The secretary-treasurer may receive an additional salary to be fixed by the board, said expenses and salaries to be paid from fees received by the board under the provisions of this article, and in no case to be charged upon the treasury of the State.

All moneys received in excess of said allowance, and other expenses provided for, shall be held by the secretary-treasurer for the

expenses of the board and for extending nursing education in the State. (1917, c. 17, s. 2; 1925, c. 87, s. 5.)

**Editor's Note.**—By the Act of 1925 it is provided that the compensation of the board, and the secretary-treasurer shall be fixed by the board. Formerly a definite sum was specified.

### **§ 6731. Meetings for examination; prerequisites for applicants.**

The board of nurse examiners of North Carolina shall convene not less frequently than once annually, and at any time ten or more applicants shall notify the secretary-treasurer that they desire an examination. Thirty days prior to such meetings notice stating time and place of examination shall be published in one nursing journal and three daily State papers.

At such meetings it shall be the duty of the board of nurse examiners to examine graduate nurses applying for license to practice their profession in North Carolina. An applicant must prove to the satisfaction of the board that he or she is twenty-one years of age, is of good moral character, and has received at least one year of high school education or its equivalent.

Applicants shall have graduated from a school of nursing connected with a general hospital giving a three years course of practical and theoretical instruction meeting the minimum requirements of the American Nurses' Association in effect at time of application, or from a school of nursing connected with small or special hospitals and sanatoria meeting the aforesaid requirements by affiliation with one or more schools of nursing. Schools of nursing may give credits for college work on the three years course as they may deem wise, such credits not to total more than one year for any one person. (1917, c. 17, s. 3; 1925, c. 87, s. 6.)

**Editor's Note.**—The only material change made in this section by the Act of 1925 is the addition of the provision that schools shall meet the requirements of the American Nurses' Association.

### **§ 6732. Scope of examinations; fees; licensing.**

Examinations shall be held in anatomy and physiology, materia medica, dietetics, hygiene and elementary bacteriology, obstetrical, medical and surgical nursing, nursing of children, contagious diseases and ethics of nursing, and such other subjects as may be prescribed by the examining board. The subject of contagious diseases may be given in theory only. If on examination the applicant should be found competent, the board shall grant a license authorizing him or her to register as herein provided and to use the title "registered nurse," signified by the letters "R. N."

Before an applicant shall be permitted to take such an examination he or she shall pay to the secretary of the examining board an examination fee of ten dollars. In the event of the failure of the ap-



plicant to pass examination, one-half of the above named fee shall be returned to the applicant. (1917, c. 17, s. 4; 1925, c. 87, s. 7.)

**Editor's Note.**—No change is made in this section by the Act of 1925.

### **§ 6733. Licenses and certificates without examination; fee.**

The board of nurse examiners shall have authority to issue licenses without examination to nurses registered in other states: *Provided*, that said states shall maintain an equivalent standard of registration requirements. The examination fee shall accompany each such application for license.

The board shall also have power in the exercise of its discretion to issue a certificate of registration without examination to any applicant who has been duly registered as a registered nurse under the laws of another state: *Provided*, said applicant possesses qualifications at least equal to those required by the State of North Carolina. The fee for license without examination shall be twenty-five dollars (\$25.00). (1917, c. 17, s. 5; 1925, c. 87, s. 8.)

**Editor's Note.**—The second paragraph of this section is new with the Act of 1925.

### **§ 6734. Only licensed nurses to practice.**

On and after the ratification of this article all "trained," "graduate," "licensed," or "registered" nurses must obtain license from the board of nurse examiners before practicing their profession in this State, and before using the abbreviation "R.N." must obtain a certificate of registration from the clerk of the Superior Court of any county as hereinafter provided, but nothing in this section shall be construed to apply to any nurse who is now qualified and practicing her profession. (1917, c. 17, s. 6; 1917, c. 288; 1925, c. 87, s. 9.)

**Editor's Note.**—The section is substantially the same as before the Act of 1925 except for the omission of a proviso preventing the section from having retroactive effect.

### **§ 6735. Certain persons not affected by this article.**

This article shall not be construed to affect or apply to the gratuitous nursing of the sick by friends or members of the family, or any hospital or sanatorium that send their nurses into private homes or elsewhere for hire during the time they are in said institution taking training, or to any person taking care of the sick for hire who does not represent himself or herself or in any way assume to practice as a "trained," "graduate," "licensed," or "registered nurse." (1917, c. 17, s. 7; 1925, c. 87, s. 10.)

**Editor's Note.**—This section is not changed by the Act of 1925.

### **§ 6735 (a). Temporary nursing in state.**

The board of nurse examiners may make reasonable rules of comity allowing registered nurses from other states to do temporary nursing in this State. (1925, c. 87, s. 10½.)

**§ 6736. Registration of nurses.**

The clerk of the Superior Court of any county, upon presentation to him of a license from the State Board of Nurse Examiners issued at a date not more than twelve months previous, shall enter the date of registration and the name and residence of the holder thereof in a book to be kept in his office for this purpose, and marked "record of registered nurses," and shall issue to the applicant a certificate of such registration, under the seal of the Superior Court of the county, upon a form to be prescribed by the board of nurse examiners. For such registration he shall charge a fee of fifty cents. (1917, c. 17, s. 8; 1925, c. 87, s. 11.)

**Editor's Note.**—This section is not changed by the Act of 1925.

**§ 6737. Revocation of licenses.**

The board shall have power to revoke the license of any registered nurse upon conviction of gross incompetence, dishonesty, intemperance, or any act derogatory to the morals or standing of the profession of nursing. No license shall be revoked except upon charges preferred. The accused shall be furnished a written copy of such charges, and given not less than twenty days notice of the time and place when said board shall accord a full and fair hearing on the same. Upon the revocation of a license and certificate the name of the holder thereof shall be stricken from the roll of registered nurses in the hands of the secretary of the board, and by the clerk of the Superior Court from his register upon notification of such action by said secretary. (1917, c. 17, s. 9; 1925, c. 87, s. 12.)

**Editor's Note.**—This section is not changed by the Act of 1925.

**§ 6738. Violation of article misdemeanor.**

That any person procuring license under this article by false representation, or who shall refuse to surrender a license which has been revoked in the manner prescribed in the preceding section, or who shall use the title "trained," "graduate," "licensed," or "registered nurse," or the abbreviation "R.N.," without having first obtained a license, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not exceeding thirty days. Each act shall constitute a new offense. (1917, c. 17, s. 10; 1925, c. 87, s. 13.)

**Editor's Note.**—This section is not changed by the Act of 1925.

**§ 6740. Colored nurses for colored patients.**

(Repealed: 1925, c. 23.)

**ART. 10. VETERINARIES****§ 6760. Practitioners before one thousand nine hundred and three.**

1. All persons who practiced veterinary medicine or surgery as a profession previous to the first day of March, one thousand nine



hundred and three, shall be allowed to practice veterinary medicine or surgery in this state: *Provided*, they shall file [within ten days from the last day of the special session of the general assembly of North Carolina of 1924], with the North Carolina board of veterinary medical examiners a statement, duly sworn to before some officer authorized to administer oaths in North Carolina, setting forth that they practiced veterinary medicine or surgery as a profession previous to March the first, one thousand nine hundred and three, and requesting said state board to register them. Upon the filing of such sworn statement and application for such registration, said state board of veterinary medical examiners shall issue a certificate to such applicant, which shall grant to such applicant the privilege of practicing veterinary medicine or surgery in the state of North Carolina. 2. [*Provided*, that any person coming under the provisions of subsection one of this section shall, before taking advantage thereof and practicing veterinary medicine and surgery, procure the approval of his application by the Secretary of the Board of Examiners of the North Carolina State Veterinary Association]. (Rev., s. 5437; 1903, c. 503, s. 11; 1905, c. 320; 1913, c. 129; 1919, c. 94; 1921, c. 171; Ex. Sess. 1921, c. 68; 1924, c. 38.)

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## CHAPTER 111

### MILITIA

#### ART. 2. GENERAL ADMINISTRATION OFFICERS

##### § 6802. Adjutant general.

The governor shall appoint an adjutant general, who shall have had not less than five years commissioned service in the national guard, naval militia, regular army, United States navy or marine corps; [who while holding such office may be a member of the active national guard or naval militia]. (1917, c. 200, s. 14; 1925, c. 54.)

#### ART. 10. SUPPORT OF MILITIA

##### § 6889. Allowances made to different organizations; appropriation.

The commanding officer of each brigade, regiment, the coast artillery, and the naval militia, shall maintain a headquarters office, for which actual expense therefor shall be allowed, to include office rent, light, heat, stamps, stationery, printing, and other necessary expenses, not to exceed two hundred and twenty-five dollars per annum. The commanding officer of each squadron of cavalry, battalion of engineers, or other like units, duly authorized by the secretary of war, shall maintain a headquarters office, for which actual expenses therefor shall be allowed, to include office rent, light, heat,

stamps, stationery, printing, and other necessary expenses, not to exceed the sum of one hundred and twenty-five dollars per annum. There shall be allowed to each major of the line not exceeding one hundred dollars per annum with which to defray the necessary expenses of their respective officers. The chief surgeon and the commanding officer of each company of infantry, headquarters company, supply company, machine-gun company, coast artillery company, company of engineers, battery of field artillery, signal corps company, troop of cavalry, field hospital, ambulance company, aero squadron, division of naval militia, company of marines, and aeronautic section, and similiar units prescribed by the war department in its table of organization for the national guard, shall be allowed annually the sum of not exceeding two hundred dollars, to be determined by the adjutant-general of the state under rules and regulations prescribed by him; [Each lieutenant of such organizations and other officers of corresponding grades and duties in the naval militia, the sum of not exceeding one hundred dollars (\$100), to be determined by the Adjutant General of the State according to rules and regulations prescribed by him; battalion adjutants, the sum of not exceeding fifty dollars (\$50), to be determined by the Adjutant General of the State according to rules and regulations prescribed by him; the commanding officer of each medical detachment, the sum of not exceeding one hundred dollars (\$100), in accordance with rules and regulations prescribed by the Adjutant General of the State, for the purpose of defraying the necessary expenses of their respective offices.] There shall be allowed annually to each company of infantry, headquarters company, supply company, machine-gun company, coast artillery company, company of engineers, battery of field artillery, signal corps company, troop of cavalry, field hospital, ambulance company, aero squadron, aeronautic section, division of naval militia, or company of marines, and similar units prescribed by the war department in its table of organization for the national guard, not to exceed the sum six hundred dollars, and to each regimental infirmary the sum of one hundred and fifty dollars, and to each sanitary detachment the sum of one hundred dollars, to be applied to the payment of armory rent, heat, light, stationery, printing, and other necessary expenses. There shall be allowed annually to the supply sergeant of each company of infantry, headquarters company, supply company, machine-gun company, coast artillery company, company of engineers, battery of field artillery, signal corps company, troop of cavalry, field hospital, ambulance company, aero squadron, and to a petty officer of each division of naval militia, aeronautic section, marine company, and supply sergeants of similar units, the sum of one hundred dollars and to corresponding warrant officers of each regimental infirmary and sanitary detachment the sum of twenty-five dollars. There shall be paid monthly to stable sergeants the sum of fifteen dollars, and to the horseshoers, ten dollars, of units entitled to and actually having animals to care for. Each enlisted man belonging to an organization of



the national guard shall receive fifty cents as compensation for each armory drill, not exceeding sixty drills per annum, ordered for his organization, where he is officially present and in which he participates, the said compensation to be paid in the same manner and under such laws and regulations as now or hereafter may be prescribed by the United States government or by the war department thereof for pay for national guard enlisted men: and provided further, that the appropriation made by the state of North Carolina for the support of the national guard is sufficient, after the payment of other necessary expenses of maintaining said guard, to make such payment.

All payments are to be made by the state disbursing officer in semiannual installments on the first day of July and the first day of January of each year; but no payment shall be made unless all drills and parades required by law are duly performed by all organizations named. No officer shall be entitled to receive any part of the amounts named herein unless he has performed satisfactorily all duties required of him by law and has pursued such course of instruction as may from time to time be required.

The commanding officers of all organizations participating in the appropriations herein made shall render an itemized statement of all funds received from any source whatsoever for the support of their respective organizations in such manner and on such forms as may be prescribed by the adjutant-general. Failure on the part of any officer to submit promptly when due the financial statement of his organization will be sufficient cause to withhold all appropriations for such organizations.

The sum of sixty-five thousand dollars is hereby appropriated annually, out of any moneys in the treasury not otherwise appropriated. All moneys not used by January first of each year shall be paid to the state treasurer and turned into the general fund of the state. (1917, c. 200, s. 97; 1919, c. 311; 1921, c. 120, s. 11; 1923, c. 24; 1924, c. 6.)

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## CHAPTER 113

### MONUMENTS, MEMORIALS AND PARKS

#### ART. 3. MOUNT MITCHELL PARK COMMISSION

##### § 6940. Duties.

The [Board of Conservation and Development] shall exercise and perform all the rights, powers, duties, and obligations that have been heretofore exercised and performed by the Mount Mitchell park commission and the Mitchell Peak park commission, and said board shall be the lawful successor of said commissions. The board shall have complete control, care, protection and charge of that part of Mit-

chell's park acquired by the state. (1919, c. 316, s. 3; 1915, c. 76; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

**§ 6941. Meetings; term of service; annual reports to governor; successors.**

(Repealed: Act 1925, c. 122, s. 23.)

**§ 6942. Roads, trails, and fences authorized; protection of property.**

The [Board of Conservation and Development] is authorized and empowered to enter upon the land hereinbefore referred to, and to build a fence or fences around the same, also roads, paths, and trails, and protect the property against trespass and fire and injury of any and all kinds whatsoever; cut wood and timber upon the same, but only for the purpose of protecting the other timber thereon and improving the property generally. (1919, c. 316, s. 5; 1921, c. 222, s. 1; 1925, c. 122, s. 23.)

**§ 6942 (a). Fees for use of improvements. Fees for other privileges. Leases. Rules and regulations.**

The [Board of Conservation and Development] is further authorized and empowered to charge and collect fees for the use of such improvements as have already been constructed, or may hereafter be constructed, on the park, and for other privileges connected with the full use of the park by the public; to lease sites for camps, houses, hotels, and places of amusement and business; and to make and enforce such necessary rules and regulations as may best tend to protect, preserve, and increase the value and attractiveness of the park. (1921, c. 222, s. 2; 1925, c. 122, s. 23.)

**§ 6942 (b). Use of fees and other collections.**

All fees and other money collected and received by the [Board of Conservation and Development] in connection with its proper administration of Mount Mitchell state park shall be used by said board for the administration, protection, improvement, and maintenance of said park. (1921, c. 222, s. 3; 1925, c. 122, s. 23.)

**§ 6942 (c). Annual reports.**

The [Board of Conservation and Development] shall make an annual report to the governor of all money received and expended by it in the administration of Mount Mitchell state park, and of such other items as may be called for by him or by the general assembly. (1921, c. 222, s. 4; 1925, c. 122, s. 23.)

ART. 5. GENERAL PROVISIONS.

**§ 6985. Vessels on inland waterways exempt from pilot laws; proviso as to steam vessels.**

**Under the Federal Law.**—Vessels passing through the inland waterways of the State are exempt from the pilot laws by the State statutes,



subject to the proviso of this section; and, under the Federal statutes, whether a vessel has a gross tonnage of more than fifteen tons should be determined by the method prescribed by the Federal statutes requiring a pilot; and in an action for damages alleged to have been caused by defendant's negligence in a collision, it is reversible error for the trial judge to direct an affirmative answer to the issue of contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry thirty tons. *Harris v. Slater*, 187 N. C. 163, 121 S. E. 437.

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## CHAPTER 116

### PUBLIC ACCOUNTANTS

#### §§ 7008-7024. Public accountants.

(Repealed: Act 1925, c. 261, s. 13.)

**Editor's Note.**—The Act of 1913 from which chapter 116 of Consolidated Statutes was codified, was expressly repealed by the Act of 1925, c. 261. However, as many of the provisions of the old act were reenacted by the repealing act and will be found codified as sections 7024(a) to 7024(m), the constructions of the 1913 act are here inserted.

**In General.**—The provisions of C. S., 7008 to 7024, inclusive, creating and incorporating the State Board of Accountancy, confers upon its members continuous quasi-judicial powers as an arm of the State Government in which the people of the State are interested, both as to their administration and to a certain extent in the funds of the board, the compensation of members being paid by fees fixed by law, any surplus to be deposited in the State Treasury, and in these, and in other respects, its members are to be regarded as State officials to the extent of their duties specified in the statute. *State v. Scott*, 182 N. C. 865, 109 S. E. 789.

**Exercise of Police Power.**—Our statutes creating a State Board of Accountancy and giving them authority to pass upon applications and issue licenses to those qualified as public accountants, are within the exercise of the police powers of the State, in which the public are interested, as well as one to whom a certificate has been issued, and the State is also interested in the requirement that moneys collected and not necessary to the purposes of the act be turned into the State Treasury. *State v. Scott*, 182, N. C. 865, 109 S. E. 789.

**Holding Examination Beyond State Boundaries.**—The exercise of the powers of the State Board of Accountancy, the members of which are to be regarded as State officials, is coextensive with the State boundaries, and may not be exercised beyond them, the word jurisdiction embracing not only the subject-matter coming within the powers of officials, but also the territory within which the powers are to be exercised. *State v. Scott*, 182 N. C. 865, 109 S. E. 789.

The legislative intent will not be construed by implication to extend the exercise of a quasi-judicial power by public officers to places beyond the State boundaries, as where the statute creates a State Board of Accountancy, gives it the power to examine and license applicants, and states that the board may do so "at such place as it may designate;" for the presumption being against the exercise of such extra territorial power, the discretion of the board in the exercise of this power will be confined to places within the boundaries of this State. *State v. Scott*, 182 N. C. 865, 109 S. E. 789.

Where a statute prescribes the means for the exercise of a power granted by the act, no other or different means can be implied as being

more effective or convenient, and the Legislature having incorporated a State Board of Public Accountancy, giving it the power to determine upon examination whether applicants for license therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the board acts *ultra vires* in holding an examination beyond the boundaries of the State upon the request of nonresidents desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the board would hold an examination outside the State is not binding or controlling on the question. *State v. Scott*, 182 N. C. 865, 109 S. E. 789.

**Same—Injunction.**—The Attorney-General may of his own motion, or upon the complaint of a private party, become a party to a suit that seeks to prevent an *ultra vires* act or the misapplication of a fund in which the public is interested. *State v. Scott*, 182 N. C. 865, 109 S. E. 789.

The examination and granting license to applicants for certificates as public accountants, beyond the borders of our State, being the exercise of a quasi-judicial power, under the police powers of the State, is void, and an injunction will lie to prevent it, in a suit of the State *ex rel.* Attorney-General and an accountant holding a certificate from the board, who is also a citizen and taxpayer of North Carolina. *State v. Scott*, 182 N. C. 865, 109 S. E. 789.

Where an injunction is sought to restrain an *ultra vires* act of the State Board of Public Accountancy in holding an examination for the applicants for license as public accountants, beyond the boundaries of the State, the courts, upon sufficient evidence or admissions, will continue the restraining order to the hearing, to prevent the commission of such acts in the future, and the objection cannot be successfully maintained, that the specific act complained of has been committed and leaves nothing for such order to operate upon, nor will the declaration by the board that they will not do so in the future affect the matter. *State v. Scott*, 182 N. C. 865, 109 S. E. 789.

**Same—Same—Parties.**—Where an injunction is sought in a suit brought against the State Board of Public Accountancy by a certified public accountant under the provisions of our statute, alleging that the defendant was attempting to do an *ultra vires* act in holding an examination beyond the boundaries of the State, and unlawfully diverting the funds, and exception has been taken in the lower court, that the suit should have been brought *State ex rel.* the Attorney-General, etc., an amendment to this effect may be allowed in the Supreme Court, so that the case may be heard on its merits, it appearing that the defendant will not thereby be prejudiced. *State v. Scott*, 182 N. C. 865, 109 S. E. 789.

## § 7024 (a). “Public accounting” defined.

The term “Practice of Public Accounting” as used in this chapter is defined as follows:

A person engages in the practice of public accounting within the meaning and intent of this chapter who holds himself out to the public as a certified public accountant, or public accountant, and as such offers to the public to engage in the occupation or practice of public accounting: *Provided, however*, that nothing in this chapter shall be construed to prohibit any person, firm or corporation from performing accounting service or any similar service who does not hold himself out to be a certified public accountant or public accountant, or represent that such service is performed as a certified public accountant or a public accountant. (1925, c. 261, s. 1.)



**§ 7024 (b). Qualifications.**

Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over twenty-one years of age and of good moral character, and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant as hereinafter provided, or who is the holder of a valid and unrevoked certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2.)

**§ 7024 (c). Unlawful use of title "certified public accountant" by individual.**

It shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant. (1925, c. 261, s. 3.)

**§ 7024 (d). Use of title by firm.**

It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant. (1925, c. 261, s. 4.)

**§ 7024 (e). Use of title by corporation.**

It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that such corporation has received a certificate of qualification from the State Board of Accountancy admitting it to practice as a certified public accountant. (1925, c. 261, s. 5.)

**§ 7024 (f). Unlawful practice; by corporation.**

It shall be unlawful for any person, firm, copartnership or association to engage in the practice of public accounting in the State of North Carolina unless such person, or each of the members of such firm, copartnership or association first shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant. It shall be unlawful for any corporation to engage in the practice of public accounting

in the State of North Carolina: *Provided, however*, that nothing herein contained shall be construed to prohibit the practicing of the profession of public accounting by any person, firm, copartnership, association, or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor. (1925, c. 261, s. 6.)

**§ 7024 (g). Registration of accountants already practicing.**

Any person, firm, copartnership, association or corporation who shall on March 10, 1925 be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, may, within six months thereafter, apply to the State Board of Accountancy for registration as a public accountant, and the State Board of Accountancy, upon the production of satisfactory evidence that such applicant was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina on March 10, 1925, shall register such person, firm, copartnership, association or corporation. Such registration shall be conclusive evidence of the right of such person, firm, copartnership, association or corporation to engage in the practice of public accounting in the State of North Carolina, but such registration shall not be construed in any way as indicating that the State of North Carolina or the State Board of Accountancy has approved the educational and professional experience [and] qualifications of the registrant. (1925, c. 261, s. 7.)

**§ 7024 (h). Use of title "public accountant" without qualification.**

It shall be unlawful for any person, firm, copartnership, association or corporation, not having qualified under this chapter, to assume or use the style of title of public accountant, or other means of identification to indicate that such person, firm, copartnership, or association or corporation is engaged in the practice of public accounting in the State of North Carolina: *Provided, however*, that the inhibitions of this section shall not be construed to apply to any person, firm, copartnership, association or corporation who in March 10, 1925 was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina. (1925, c. 261, s. 8.)

**§ 7024 (i). Assistants need not be certified.**

Nothing contained in this chapter shall be construed to prohibit the employment by a certified public accountant, or by any person, firm, copartnership, association, or corporation permitted to engage in the practice of public accounting in the State of North Carolina,



of persons who have not received certificates of qualification admitting them to practice as certified public accountants, as assistant accountants or clerks: *Provided*, that such employees work under the control and supervision of certified public accountants or public accountants, and do not certify to any one the accuracy or verification of audits or statements; and *provided further*, that such employees do not hold themselves out as engaged in the practice of public accounting. (1925, c. 261, s. 9.)

#### **§ 7024 (j). Persons certified in other states.**

A public accountant who holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued under authority of any state, or the District of Columbia, and who resides without the State of North Carolina, may perform work within the State: *Provided*, that he register with the State Board of Accountancy and comply with its rules regarding such registration. (1925, c. 261, s. 10.)

#### **§ 7024 (k). Not applicable to officers of state or municipality.**

Nothing herein contained shall be construed to restrict or limit the power or authority of any State, county or municipal officer or appointee engaged in or upon the examination of the accounts of any public officer, his employees or appointees. (1925, c. 261, s. 12.)

#### **§ 7024 (1). Board of accountancy; powers and duties.**

The State Board of Accountancy shall consist of four persons to be appointed by the Governor, all of whom shall be the holders of valid and unrevoked certificates as certified public accountants heretofore issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or issued under the provisions of this chapter. They shall hold office for the term of three years and until their successors are appointed: *Provided*, that no appointments to the board shall be made under the provisions of this chapter until the expiration of the terms of the members of the present board. The powers and duties of the board shall be as follows:

(1) To elect from its members a president, vice-president and secretary-treasurer. The members of the board shall be paid, for the time actually expended in pursuance of the duties imposed upon them by this chapter, an amount not exceeding ten dollars (\$10) per day, and they shall be entitled to necessary traveling expenses.

(2) To employ legal counsel and clerical assistance and to fix the compensation of same, and to incur such other expenses as may be deemed necessary to carry into effect the provisions of this chapter.

(3) To formulate rules for the government of the board and for the examination of applicants for certificates of qualifications admitting such applicants to practice as certified public accountants.

(4) To hold written or oral examinations of applicants for certificates of qualification at least one year, or oftener, as may be deemed necessary by the board.

(5) To issue certificates of qualification admitting to practice as certified public accountants to each applicant, who, being the graduate of an accredited high school or having an equivalent education, shall have had at least two years experience or its equivalent next preceding the date of his application on the field staff of a certified public accountant or public accountant one of which shall have been as a senior or accountant in charge, and who shall receive the endorsement of three certified public accountants of any state as to his eligibility to become a certified public accountant; or who, in lieu of the two years experience or its equivalent, above mentioned, shall have had one year's experience after graduating from a recognized school of accountancy; or an accountant who has served two years or more as a civil service employee of the Federal government in the capacity of senior field auditor, and who shall have passed a satisfactory examination in "theory of accounts," "practical accounting," "auditing," "commercial law" and other related subjects.

(6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants to such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or its equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia; or who shall hold a valid and unrevoked certificate or degree as certified public accountant or its equivalent issued under authority granted by a foreign nation; when in the judgment of the board the requirements for the issuing or granting of such certificate or degree are substantially equivalent to the requirements established by this chapter: *Provided, however,* that such applicants signify their intention of engaging in the practice of public accounting within the State.

(7) To charge for each examination and certificate provided for in this chapter a fee of twenty-five dollars. This fee shall be payable to the secretary-treasurer of the board by the applicant at the time of filing application. If at any examination an applicant shall have received a passing grade in one subject, he shall have the privilege of one reexamination at any subsequent examination held within eighteen months from the date of his application upon payment of a reexamination fee of fifteen dollars. In no case shall the examination fee be refunded, unless in the discretion of the board the applicant shall be deemed ineligible for examination.

(8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge and collect a fee not to exceed five dollars for such renewal.

(9) The board shall have the power to revoke any certificate issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, or



issued under the provisions of this chapter, for good and sufficient cause: *Provided*, that written notice shall have been mailed to the holder of such certificate at his last known address twenty days before any hearing thereof, stating the cause of such contemplated action, and appointing a time for a hearing thereon by the board; and *provided further*, that, except for failure to renew such certificate and to pay the renewal fee thereof, no certificate shall be revoked until such hearing shall have been had. At all such hearings the Attorney General of the State, or one of his assistants designated by him, shall sit with the board with all the powers of a member thereof.

(10) Within sixty days after March 10, 1925, the board shall formulate rules for the registration of those persons, firms, copartnerships, associations or corporations who, not being holders of valid and unrevoked certificates as certified public accountants issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, and who, having on March 10, 1925, been engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, shall, under the provisions of section 7024 (g) apply to the board for registration as public accountants. The board shall maintain a register of all persons, firms, copartnerships, associations or corporations who have made application for such registration and have complied with the rules of registration adopted by the board.

(11) Within sixty days after March 10, 1925 the board shall formulate rules for registration of these public accountants who are qualified to practice under this chapter and who under the provisions of section 7024 (j) are permitted to engage in work within the State of North Carolina. The board shall have the power to deny or withdraw the privilege herein referred to for good and sufficient reasons.

(12) To submit to the Commissioner of Revenue the names of all persons who have qualified under this chapter as practitioners of public accountancy, and who have complied with the rules of the board. The Commissioner of Revenue shall issue only to those whose names are so submitted to him by the board a license for the privilege of practicing the profession of public accountancy, and the license so issued shall be evidence of his registration with the board.

(13) The board shall keep a complete record of all its proceedings and shall annually submit a full report to the Governor.

(14) All fees collected on behalf of the State Board of Accountancy, and all receipts of every kind and nature, as well as the compensation paid the members of the board and the necessary expenses incurred by them in the performance of the duties imposed upon them by this chapter, shall be reported annually to the State Treasurer. Any surplus remaining in the hands of the board over the amount of three hundred dollars shall be paid to the State Treasurer at the time of submitting the report, and shall go to the credit

of the general fund: *Provided*, that no expense incurred under this chapter shall be charged against the State.

(15) Any certificate of qualification issued under the provisions of this chapter, or issued under the provisions of chapter one hundred and fifty-seven of the Public Laws of one thousand nine hundred and thirteen, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within thirty days after demand for such renewal fee shall have been made by the State Board of Accountancy. (1925, c. 261, s. 11.)

#### **§ 7024 (m). Violation of chapter; penalty.**

Any violation of the provisions of this chapter shall be deemed a misdemeanor, and upon conviction thereof the guilty party shall be fined not less than fifty dollars and not exceeding two hundred dollars for each offense. (1925, c. 261, s. 11.)

#### **§ 7024 (n). Partial invalidity.**

If any section, subsection, clause or phrase of this chapter is for any reason held to be unconstitutional by the courts of this State or the United States then such decision shall affect only that section, subsection, clause or phrase so declared to be unconstitutional, and shall not affect any other section, subsection, clause or phrase of this chapter. (1925, c. 261, s. 11.)

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## CHAPTER 117

### **PUBLIC BUILDINGS AND GROUNDS**

#### **ART. 1. OFFICERS IN CHARGE**

#### **§ 7025. Board of public buildings; keeper of capitol.**

The Governor and Secretary of State, the Treasurer and Attorney-General shall constitute the board of public buildings and grounds, and they shall appoint a keeper of the capitol, public grounds and arsenal, and he shall hold his office until his successor is appointed and files his bond in accordance with the requirements of the board and the law relating to bonds. The keeper of the capitol shall perform all the duties and exercise all the powers herein prescribed, in accordance with and pursuant to the judgment, discretion and resolutions of the board of public buildings and grounds, and shall perform such duties under their direction; and he shall appoint and control all assistants, help and subordinates, such as watchmen of the capitol, workmen on the grounds, domestic servants for the executive mansion, and servants about the capitol and its appurtenances, including the servants and messengers waiting and attending upon the Supreme Court, and janitors for the Su-



preme Court building. (Rev., 5006; Code, 2301; 1899, c. 482; 1870-1, cc. 8, 175; 1880, c. 61; 1909, c. 860; 1925, c. 315.)

**Editor's Note.**—By the Act of 1925 the keeper of the capitol is given authority to appoint servants and messengers of the Supreme Court, formerly expressly prohibited. Provisions limiting the number of janitors of the supreme court building to one and the compensation of domestic servants to \$750 per annum were omitted.

### § 7026. Bond of keeper of capitol.

Before entering upon the duties of his office the keeper of the capitol shall execute a bond with good and sufficient surety or security, in the sum of at least two hundred fifty dollars, payable to the State of North Carolina, and conditioned for the faithful discharge of his duties, and the board of buildings and grounds may increase the penal sum of said bond, in their discretion. The bond shall be deposited in the office of the Secretary of State, and shall be renewed every two years, with such surety and in such amount as the board of public buildings and grounds may direct, and the same may be sued upon whenever in the judgment of said board the conditions thereof, or any of them, may have been broken; and the same shall not be discharged until the whole penalty is exhausted in damages. (Rev., 291; Code 2306; R. C., c. 103, s. 6; 1925, c. 315.)

**Editor's Note.**—The only material change in this section by the Act of 1925, is the addition of the provision for increase of the penalty of the bond.

### § 7027. Duties of the board and the keeper.

The board of public buildings and grounds shall take charge of and keep in repair the public buildings of the State, in the city of Raleigh, and shall, from time to time as the same may be needed, procure, furnish and keep in repair for the halls of the Senate and House of Representatives, and the public offices of the capitol, all necessary furniture using for such purpose, only such funds as shall have been appropriated therefor by the Legislature. The keeper of the capitol, among his other duties, shall take care of the furniture, sweep and clean and dust all parts of such buildings, whether occupied or not, keep the keys of the several doors not occupied as offices, and conduct visitors through the capitol upon request, and shall, under the direction of the board, trim or remove trees standing in the public square, and remove the leaves and other rubbish as often as may be necessary; and shall perform any other duty in relation thereto of which he is capable, whenever directed by the said board so to do. The board shall, at all times, use such means as may, in their opinion, be effectual to secure the capitol and other public buildings, in the city of Raleigh, from fire. This chapter shall apply to and include all lots in the city of Raleigh belonging to the State and used as public parks, and the buildings and grounds formerly occupied by the Institution for the Blind, on Jones and McDowell streets, and to all other property within the city of Raleigh,

not now used or devoted to the use of some institution or State agency. (Rev., 5008; Code, 2303; R. C., c. 103, s. 3; 1925, c. 315.)

**Editor's Note.**—By the Act of 1925 the provision limiting the amount expended to funds appropriated therefor, and the last sentence of the section are added.

### § 7028. Arsenal provided.

The board of public buildings and grounds shall provide a suitable building or space in some building for an arsenal. The Governor may make such provision as he may deem necessary for the care and issue of property and for guarding and protecting the arsenal. (Rev., 5007; Code 2302; 1870-1, c. 175, s. 3; 1917, c. 200, s. 96; 1925, c. 315.)

**Editor's Note.**—By the Act of 1925 the provision that the arsenal may be a building "or space in some building," was added.

### § 7029. Accounts for labor audited.

No account for work or labor done on the capitol square or public grounds in the city of Raleigh, or in the public buildings, shall be audited and paid until the same is sworn to before the Secretary of State, or some other person authorized to administer oaths, to be just and true, and the same shall be so certified by the Secretary of State and the keeper of the capitol. Neither the Secretary of State nor the keeper of the capitol shall certify for payment the account of any laborer for work done or services rendered, pursuant to this chapter, in any of such buildings or any of such grounds, unless it appear to their satisfaction that such laborer or employee has been employed by the keeper of the capitol and that such work and services have been rendered in a satisfactory manner. (Rev., s. 5017; Code, s. 2310; 1870-1, c. 80, s. 2; 1925, c. 315.)

**Editor's Note.**—The account may now be sworn to before any officer authorized to administer oaths, formerly it was required to be before the Secretary of State. It was further provided that the keeper of the capitol certify the account as well as the Secretary of State, and that no account be certified unless the work is properly done.

### § 7030. Accounts for fuel audited.

No account for fuel shall be audited or paid until the claimant makes oath, as in the preceding section, that the account is just and true, and that the number of cords of wood, or tons of coal charged for have been delivered to the authorities to receive the same at the public building. (Rev., 5018; Code, s. 2311; 1870-1, c. 80, s. 3; 1925, c. 315.)

**Editor's Note.**—This section is unchanged by the Act of 1925.

## ART. 2. PUBLIC BUILDINGS

### § 7031. Rooms assigned in the capitol.

The rooms of the capitol, other than the Senate chamber and House of Representatives, shall be appropriated as follows: The



two west rooms of the southern division of the capitol shall be appropriated to the Executive; the two east rooms in the southern division shall be appropriated to the Treasurer; the two east rooms in the northern division shall be appropriated to the Secretary of State, and the two rooms opposite to the Auditor; the upper room in the east wing to the Insurance Commissioner; and the room number three, in the west wing, shall be appropriated and set apart to the enrolling clerks of the General Assembly. The other rooms shall be used for State purposes under the direction of the board of public buildings. (Rev., s. 5010; Code, s. 2305; R. C., c. 103, s. 5; 1885, c. 121, s. 8; 1925, c. 315.)

**Editor's Note.**—No change is made in this section by the Act of 1925.

### **§ 7032. Custodian of administration building.**

The board of public buildings and grounds shall appoint a custodian of the administration building, who shall hold his office until his successor is appointed. The custodian shall, under the general direction of the officials above named and the keeper of the capitol, have the management and control of the administration building, take care of the furniture and keep clean all parts of the building, keep the keys to the several rooms not occupied as offices, conduct visitors through the buildings, upon request, and perform any other duty of which he is capable, whenever especially ordered by the keeper of the capitol or the board of public buildings and grounds to do so. (1913, c. 96, s. 1; 1925, c. 315.)

**Editor's Note.**—By the Act of 1925 the power of appointing the custodian is transferred from the judges of the supreme court, the state librarian and the secretary of the historical commission to the board of public buildings and grounds.

### **§ 7033. Keeper of the capitol to employ assistants.**

The keeper of the capitol is empowered to employ such laborers and assistants as is needed to keep the administration building clean and, in order to run the elevators: *Provided*, that the number of laborers and the wages paid shall be approved by the board of public buildings and grounds and be paid, as other laborers, under the direction of the keeper of the capitol. (Extra Sess. 1913, c. 67; 1925, c. 315.)

**Editor's Note.**—By the Act of 1925, the power of employment is transferred from the custodian of the administration building to the keeper of the capitol.

### **§ 7034. Rooms assigned in administration building.**

The first floor of the State administration building shall be occupied by the State Library; the second floor by the Hall of History, hall of records and portraits, and the North Carolina Historical Commission; the third floor by the Supreme Court, the clerk of the Supreme Court, and the Attorney-General; the fourth floor by the Supreme Court Library and the Supreme Court records, and the basement of the building shall be used for storing the printed journals of

the General Assembly, printed laws, Supreme Court reports, the publications of the board of trustees of the State Library and of the Historical Commission, and for such other purposes as the board of public buildings and grounds may direct. (1913, c. 99, s. 1; 1925, c. 315.)

**Editor's Note.**—No change is made in this section by the Act of 1925.

### **§ 7035. Custodian and janitor of State Departments Building.**

The building formerly occupied by the Supreme Court and the State Library and others shall be designated as the State Departments Building. The board of public buildings and grounds is authorized to employ a custodian and a janitor for such building. (1915, c. 187, ss. 1, 2; 1925, c. 315.)

**Editor's Note.**—No change is made in this section by the Act of 1925.

### **§ 7036. Rooms assigned in State Departments Building.**

The first floor of the State Departments Building shall be occupied by the Corporation Commission and the State Tax Commission, if created. The second floor shall be occupied by the departments of Labor and Printing and Public Instruction. The third floor shall be occupied by the Department of Insurance. The fourth floor shall be occupied by the Board of Health. The basement of the building shall be used as a storeroom for the departments occupying the building and used as may be necessary by them. (1913, c. 99, s. 2; 1915, c. 187, s. 1; 1925, c. 315.)

**Editor's Note.**—No change is made in this section by the Act of 1925.

### **§ 7037. Building for Department of Agriculture.**

The building which has been erected for the Department of Agriculture shall be occupied by the Department of Agriculture and for a museum, except the entire fourth floor of this building shall be fitted up and used for committee rooms for the committees of the General Assembly, with necessary cloak room and lavatory; and ample space shall be provided on said fourth floor for the State Department of Public Welfare, including the State Board of Charities and Public Welfare and its executive staff, and the assignment of rooms to the said department shall be so arranged that the appropriate committees of the Legislature may meet in the respective rooms assigned to said department and be accessible to the information and coöperation of said department in their work. (1919, c. 203; 1925, c. 315.)

**Editor's Note.**—This section formerly authorized the construction of the building in which, it being completed, the present section assigns rooms.

### **§ 7038. Other buildings and annexes.**

The annex to the building for the Department of Agriculture, now used by the Department of Revenue, and the buildings on the lot



on Jones and McDowell Streets, formerly used by the Institution for the Blind, may be assigned by the board of public buildings and grounds to such uses and purposes as may be proper and necessary; but as to the annex now used by the Department of Revenue the use of the same shall not be changed until and unless it may be necessary for said department to assume new debts, or be assigned to other quarters in other public buildings. (1925, c. 315.)

**Editor's Note.**—The section formerly numbered 7038 referred to the disposition of space in the building authorized by the former section 7037. This provision is included in the present section 7037.

### **§ 7039. No sleeping apartments in certain buildings.**

The rooms in the capitol and Supreme Court building shall not be used as sleeping apartments, and no beds shall be kept in any room save only that used by the keeper; and he shall remove all beds and sleeping couches which may be introduced by any person into any of the rooms; and shall take charge of and keep all the keys of the rooms, except only such as are used by the heads of the departments; and of them for such time as they are not so used. (Rev., s. 5013; Code, s. 2304; R. C., c. 103, s. 5; 1842, c. 54; 1925, c. 315.)

**Editor's Note.**—No change is made in this section by the Act of 1925.

## **ART. 3. PUBLIC GROUNDS**

### **§ 7040. Keeper of capitol supervisor of public lots.**

The keeper of the capitol is appointed supervisor of all the other public lots belonging to the State, in the city of Raleigh, including the square and buildings formerly occupied by the Institution for the Blind, on Jones and McDowell streets, and except such as may be occupied by the Institution for the Blind and the Deaf and Dumb, the public schools, and Moore and Nash squares, as hereinafter set out, and such other vacant lots as may be otherwise provided for herein; and he is authorized, upon the approval of the board of public buildings and grounds, to lease such lots, or parts thereof, as it may be proper to lease, and upon such terms as may be reasonable and proper, for a period of twelve months, and to collect the proceeds of such renting, and to pay the same to the Treasurer immediately upon the collection thereof. (Rev., s. 5009; Code, ss. 2312, 2314; 1870-1, c. 282, s. 3; 1871-2, c. 205; 1925, c. 315.)

**Editor's Note.**—The reference to the buildings formerly occupied by the institution for the blind is new with the Act of 1925. The requirement of approval of leases by the board is also new. A provision for commissions to the keeper of the capitol on rents collected was omitted, and he is required to turn over the rents immediately, instead of on demand, as formerly.

### **§ 7041. Repair of walks.**

Whenever the walks in and immediately around the capitol square become so worn by action of the weather or other causes that in the judgment of the board of public buildings and grounds they should

be repaired, relocated, or resurveyed, the board is authorized to direct the keeper of the capitol to contract for suitable material for such repairs; but the work shall be done by convict labor as far as the same can be used; and the Auditor shall audit the accounts for said material and labor on the approval of the board of public buildings and grounds and the keeper of the capitol; and the board is authorized and empowered to use such material from the State Prison as may be contracted for with the board of directors of the State Prison Department upon such terms as may be reasonable and just; and the said material and convict labor shall be paid for, upon a warrant of the Auditor upon the State Treasurer, out of the appropriation for such purposes. (Rev., s. 5014; Code, s. 2316; 1881, c. 325, ss. 1, 2; 1905, c. 509; 1925, c. 315.)

**Editor's Note.**—The provision that the convict labor and material from the State Prison shall be paid for is new with the Act of 1925.

### **§ 7042. Work of convicts on public grounds.**

The superintendent and board of directors of the State Prison Department are authorized and directed, pursuant to agreement with the board of public buildings and grounds, to furnish such convict labor of the State Prison Department, to be worked under the supervision of the board of public buildings and grounds and the keeper of the capitol on such grounds of the capitol and mansion squares and public buildings, as may be deemed necessary by the board of public buildings and grounds, and the Governor is authorized to make such paroles, temporary or otherwise, of convicts in the custody of the keeper of the capitol as may be convenient for the proper and economic use of such convicts in such work, and the State Prison Department shall be compensated for such convict labor as per contract entered into with the board of directors of the State Prison by the board of public buildings and grounds; the same shall be paid for out of the appropriation to the board of public buildings and grounds. (1911, c. 149; 1925, c. 315.)

**Editor's Note.**—Formerly the number of convicts to be worked was limited to four. The provisions for parole is new. Formerly the prison was given credit for the labor, now payment is made out of the appropriation to the board according to the contract with the Prison Department.

### **§ 7043. Appropriation for public grounds.**

Such sums as may be appropriated by the General Assembly to the board of public buildings and grounds shall be used for the purposes stated in such appropriating acts, and unless so stated therein, shall be used by the board of public buildings and grounds for the care, maintenance, upkeep, preservation and repair of public buildings and grounds in the city of Raleigh, as herein specified. (Rev., s. 5016; Code, s. 2309; 1887, c. 409, s. 12; 1870-1, c. 80; 1925, c. 275, s. 6; 1925, c. 315.)

**Editor's Note.**—Formerly the sum of six hundred dollars annually was appropriated.



**§ 7044. Moore and Nash squares and other public lots.**

The board of aldermen of the city of Raleigh shall have power to grade, lay out in walks, plant with trees, shrubbery, and flowers, and otherwise adorn Moore Square and Nash Square, in said city, so as to make the same an ornament to the city, and at its own expense, and to that end, said board of aldermen, shall have the general charge and management of these squares, and the supervision and control of the same. Whenever, in the opinion of the board of public buildings and grounds, the board of aldermen of the city of Raleigh are not properly keeping said squares or other public lots, which they have taken charge of for the purposes of this section, the board of buildings and grounds shall call the same to the attention of the said board of aldermen, and if the said board of aldermen fail for a period of sixty days, to take proper care of said lots, the said board of public buildings and grounds may repossess the same and proceed to manage and keep the same as may seem to them necessary for the preservation of such property. The board of aldermen of the city of Raleigh may improve in like manner any of the vacant lots belonging to the State within the city limits not otherwise specially appropriated or rented or used. The board of aldermen shall not have power, however, to prevent the free access of well-behaved persons to such squares or lots except at unreasonable hours or for some temporary purpose especially to be designated by the board. (Rev., s. 5015; Code, ss. 2314, 2315; 1871-2, c. 205, ss. 1, 2; 1925, c. 315.)

**Editor's Note.**—The addition of the second sentence providing for procedure in case the city should not properly care for the lots, is the only material change in this section by the Act of 1925.

**§ 7045. Trespass upon public grounds.**

If any person shall willfully trespass upon any of the public lots belonging to the State in the city of Raleigh, or shall cut any timber or commit any waste, or shall refuse to surrender possession after the expiration of their leases, or if any person in possession of any of said lots above mentioned shall refuse to leave the same and shall further refuse to surrender possession within ten days after demand made by the keeper of the capitol, said person shall be guilty of a misdemeanor; and it shall be the duty of said keeper of the capitol to report all such violations of law to the Governor or to the Attorney-General, and if any of the said persons shall be convicted, they shall be fined or imprisoned at the discretion of the court. (Rev., s. 3745; Code, s. 2313; 1870-1, c. 282, s. 4; 1925, c. 315.)

**Editor's Note.**—This section is unchanged by the Act of 1925.

**§ 7046. Injuring trees in capitol square.**

No person shall drive, screw or otherwise insert any nails, screws, or other devices into or upon any of the trees in the capitol square in the city of Raleigh for any purpose whatsoever, and any person violating this section shall be guilty of a misdemeanor, and upon con-

viction shall be fined not less than ten dollars or imprisoned not more than ten days: *Provided*, this section shall not apply to preparing or repairing the small houses and drinking fountains for the squirrels in said park. (1907, c. 67, s. 1; 1925, c. 315.)

**Editor's Note.**—No change is made in this section by the Act of 1925.

### § 7047. Metallic support for wires.

All electric light companies, telephone companies or any person requiring support for wires or cables, shall use such iron or metallic poles as may be prescribed by the board of public buildings and grounds for supporting said wires within the capitol square, or shall be required to place said wires or cables in underground conduits at the direction of the board of public buildings and grounds. (1907, c. 67, s. 3; 1925, c. 315.)

**Editor's Note.**—No change is made in this section by the Act of 1925.

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## CHAPTER 118

### PUBLIC HEALTH

#### Subchapter I. Administration of Public Health Law

##### ART. 3. COUNTY ORGANIZATION

### § 7075. County commissioners may levy special tax to protect health.

**Establishing Public Hospitals.**—This section should be construed in connection with the sections of Chapter 119, as to the maintenance of permanent public hospitals, and requires that the question of establishing such hospitals, as in this case for a county tuberculosis hospital, shall have the approval of the voters of the county in accordance to the methods and in the manner specified by the statute. *Armstrong v. Board of Commissioners*, 185 N. C. 405, 117 S. E. 388.

#### Subchapter II. Vital Statistics

##### ART. 6. REGISTRATION OF BIRTHS AND DEATHS

### § 7109 (a). Delivery of data to health officer.

Each local registrar of vital statistics serving in any county or municipality of North Carolina in which there is employed a whole-time county or municipal health officer shall, on or before the fifth day of each month, deliver by mail or in person to the health officer of his respective county or municipality such data from birth and death certificates filed with such local registrar during the preceding calendar month as may be needed in the proper execution of the duties of the said whole-time county or municipal health officer, and as authorized by the State Registrar of Vital Statistics.

All forms necessary for the use of local registrars in complying



with this section shall be supplied, without charge, by the State Registrar of Vital Statistics.

Any local registrar who shall fail, neglect, or refuse to perform the duties required by this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars (\$50.00). (1925, c. 53.)

### **Subchapter III. Sanitation and Protection of Public**

#### **ART. 8. PRIVIES**

##### **§ 7140. Powers of board of health and inspectors; penalty for interference.**

**When Judge May Direct Verdict.**—In an indictment against one who is charged with willfully obstructing a sanitary inspector of the State Board of Health in the discharge of his duties, the trial judge may not direct a verdict, and it is only when uncontradicted evidence, if accepted as true, establishes the defendant's guilt that he may properly instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. *State v. Estes*, 185 N. C. 752, 117 S. E. 581.

**Mere words or opprobrious language** with an expression of an intention to resist are not sufficient to sustain an indictment for willfully interfering with or obstructing an officer of the law in the performance of his duties, as prescribed by this section, unless spoken under circumstances which are calculated to deter an officer of ordinary courage and reasonable prudence in the discharge of his duty pertaining to his office, which raises an issue of fact for the jury to determine. *State v. Estes*, 185 N. C. 752, 117 S. E. 581.

#### **ART. 13. TUBERCULOSIS**

##### **§ 7172. Directors of State Sanatorium for tuberculosis.**

The body politic and corporate existing under the name and style of the North Carolina Sanatorium for the Treatment of Tuberculosis shall be controlled and managed by a board of directors composed of nine (9) members to be appointed by the Governor. Within thirty days after March 10, 1925, the Governor shall name five (5) of said directors and within six months after March 10, 1925, the Governor shall name the remaining four (4) of said directors. At the time of naming the directors the Governor shall designate which of the present board his appointees are to succeed. All vacancies shall be filled by the Governor. The terms of the directors shall be four years from and after the date of their appointment. The Governor shall transmit to the Senate at the next session of the General Assembly the names of his appointees for confirmation. (1907, c. 964; Ex. Sess. 1913, c. 40, s. 1; 1925, c. 306, s. 12.)

**Editor's Note.**—Under the former act the directors were appointed in three classes at intervals of two years, the term being six years. Now they are all appointed in the same year and the term is four years. For removal of the officers provided for in this section see section 5912(h).

**§ 7173 (a). Indigent patients; recovery of charges from those able to pay.**

The said directors in determining the qualifications for admission for those applying as patients to the institution and in making by-laws and regulations for the governing therein shall not provide or make any by-law, regulation, or qualification for admission therein which shall exclude any patient, otherwise properly qualified for admission, on account of inability to pay for examination and treatment, or either, at said institution. That all indigent patients who otherwise are proper patients for admission in said institution when there is space and accommodation for such patient, shall be received without regard to their indigent condition; but the directors of said institution shall require of all patients who are able to pay, including those having persons upon whom they are legally dependent who are able to pay the reasonable cost of treatment and care of said institution, and they shall make such by-laws and regulations as shall most equitably carry out the directions contained in section seven thousand one hundred and seventy-three of this article. In case those persons upon whom patients are legally dependent or patients not indigent shall refuse to pay such charges for treatment and care, then said directors are authorized and empowered to institute an action in the name of the said Sanatorium in the Superior Court of Hoke County for the collection thereof, and if the amount so charged is less than two hundred dollars (\$200), then said action shall be instituted in the county where the defendant resides in a court having jurisdiction thereof; and upon said trial the charges so made shall be collectible, as upon express promise to pay the same. *Provided*, that nothing in this section shall be interpreted to conflict with or interfere with the provisions contained in section seven thousand one hundred and seventy-nine of the Consolidated Statutes. (1924, c. 86, s. 1; 1925, c. 291.)

**ART. 15. VENEREAL DISEASES****§ 7193. Sources of infection investigated; suspected persons examined.**

State, county, and municipal health officers, or their authorized deputies, within their respective jurisdictions are hereby directed and empowered, when in their judgment it is necessary to protect the public health, to make examinations of persons reasonably suspected of being infected with venereal disease, and to detain such persons until the results of such examinations are known; to require persons infected with venereal disease to report for treatment to a reputable physician and continue treatment until cured or to submit to treatment provided at public expense until cured; and also, when in their judgment it is necessary to protect the public health, to isolate or quarantine persons infected with venereal disease. It shall be the duty of all local and state health officers to investigate sources



of infection of venereal disease, to coöperate with the proper officials whose duty it is to enforce laws directed against prostitution, and otherwise to use every proper means for the repression of prostitution. [*Provided*, that no examination of any person for venereal diseases under this section shall be made by any one except a licensed physician.] (1919, c. 206, s. 3; 1925, c. 217, s. 1.)

### **§ 7194. Prisoners examined and treated; isolation of patients.**

All persons who shall be confined or imprisoned in any state, county, or city prison in the state shall be examined for and, if infected, treated for venereal diseases by the health authorities or their deputies. The prison authorities of any state, county, or city prison are directed to make available to the health authorities such portion of any state, county, or city prison as may be necessary for a clinic or hospital wherein all persons who may be confined or imprisoned in any such prison and who are infected with venereal disease, and all such persons who are suffering with venereal disease at the time of the expiration of their terms of imprisonment, and, in case no other suitable place for isolation or quarantine is available, such other persons as may be so isolated or quarantined under the provisions of the first preceding section, shall be isolated and treated at public expense until cured; or, in lieu of such isolation, any of such persons may, in the direction of the North Carolina state board of health, be required to report for treatment to a licensed physician or submit to treatment provided at public expense as provided in section 7193. Nothing herein contained shall be construed to interfere with the service of any sentence imposed by a court as a punishment for the commission of crime. [*Provided*, that no examination of any person for venereal disease under this section shall be made by any one except a licensed physician.] (1919, c. 206, s. 4; 1925, c. 217, s. 2.)

## **ART. 21. PUBLIC BAKERIES**

### **§ 7251 (p). Adulterants; stale products; infections.**

No material or ingredient may be used which may deceive the purchaser, or which lowers or lessens the nutritive value of the product. No bread or other bakery products shall be sold or offered for sale for human food that has by age or otherwise become stale. [All handling or sale of bread or other bakery products and all practices connected therewith shall be conducted so as to prevent the distribution of contamination or diseases and so as to prevent the distribution of the bakery infection in bread commonly known as "rope" or other bakery infections. No bread or other bakery products shall be returned by any dealer, restaurant, café or hotel keeper to bakery or distributor after same has been in stock where it may have been subject to contamination, no bakery or distributor shall directly

or indirectly accept any such bread or other bakery products or make any allowance for such products.] (1921, c. 173, s. 5; 1925, c. 286.)

## ART. 22. MANUFACTURE, ETC., BEDDING

### § 7251 (z). Use of material exposed to infection; "shoddy."

No person shall, in the making or remaking of any article of bedding as herein defined, [for sale within the State of North Carolina] use any material of any kind that has been used by or about any person having an infectious or contagious disease or has formed a part of any article of bedding which has been so used, or use in said manufacture any material known as "shoddy" and consisting in whole or part of old or worn clothing, carpets, or other fabric or material previously used, or use in said manufacture any other fabric or material from which shoddy is constructed. [The word "shoddy" shall mean any material which has been spun into yarn knit or woven into fabric and subsequently cut up, torn up, broken up, or ground up.] (1923, c. 2, s. 2; 1925, c. 191, s. 1.)

### § 7251 (cc). Labeling or tagging bedding; fraud.

No person shall sell, offer for sale, consign for sale, or have in his possession with intent to sell, offer for sale, or consign for sale any article of bedding as herein designated, unless the same be labeled or tagged as follows:

Upon each of such articles of bedding there shall be securely sewed upon the outside thereof a muslin or linen label [to be procured from the State Board of Health as hereinafter provided] upon which shall be legibly written or printed, in the English language, a description of the material used as the filling of such article of bedding; if any and all the material used as the filling of such article of bedding shall not have been previously used, the words "Manufactured of new material" shall appear upon said tag, together with the name and address of the maker or vender thereof.

It shall be unlawful to use in the said statement concerning any mattress the word "felt" or words of like import, if there has been used in filling said mattress any materials which are not felted and filled in layers.

If any of the material used in the making or remaking of such article of bedding shall have been previously used, [and when sterilized in conformity with section 7251 (bb)] the words "Manufactured of previously used material" or "Remade of previously used material," as the case may be, shall appear upon said tag or label, together with the name and address of the maker or vender thereof, and also a description of the material used in the filling of such article of bedding. [The tag or label required under this section shall contain a replica of the seal of North Carolina printed thereon and shall be in the following form:]



## "OFFICIAL STATEMENT

### MANUFACTURED OF NEW MATERIAL

Materials used in filling .....  
 Made by .....  
 Vender .....  
 Address .....

"This article is made in compliance with an act of the general assembly of North Carolina of the session of one thousand nine hundred and twenty-three."

The statement of compliance required in the foregoing "official statement" shall not be construed to imply that it is prohibited to state, also, that the article of bedding is made in compliance with an act or acts of other states.

The words "Manufactured of new material," or "Manufactured of previously used material," or "Remade of previously used material," together with the description of the material used as the filling of an article of bedding, shall be in letters not less than one-eighth ( $\frac{1}{8}$ ) of an inch in height.

In the case of all articles of bedding, the sewing of any edge of the tag securely into an outside seam of the article shall be deemed a compliance with that portion of the act requiring that the tag be "securely sewed" upon the article.

No term of description likely to mislead shall be used on any tag or label required by this article in the description of the materials used in the filling of any article of bedding. This article shall not be construed to prevent a person from making or having made any bedding out of materials furnished by said person for his or her own use, or to any person who does not make over six mattresses per week, provided said label is attached. [The State Board of Health is hereby authorized and directed to contract for the printing of tags or labels required by this section and shall, upon the application of any person, firm or corporation, furnish the said tags or labels fashioned and formed in accordance with the provisions hereof in lots of not less than one thousand (1000) at a cost of ten dollars (\$10) per thousand to such person, firm or corporation. The said fees or charges for said tags shall be paid directly to the State Board of Health and when so collected shall constitute a separate fund, known as the bedding fund, and shall be expended and used solely by the Board of Health in carrying out the provisions of this article, and such moneys and funds collected by the State Board of Health are hereby specifically appropriated to the use of said Board of Health for the purposes herein enumerated, and the said State Board of Health is specifically charged with the enforcement of this article in the interest of the health of the people of the State.] (1923, c. 2, s. 5; 1925, c. 191, ss. 2, 3.)

## ART. 23. TRANSPORTATION OF FOODSTUFFS

**§ 7251 (ii). Sanitation of cars.**

From and after March 4, 1925, it shall be unlawful for any carrier transporting food intended for human consumption to transport the same knowingly in cars or other vehicles which have been defiled by livestock or by human beings without having first put said car or vehicle in a sanitary condition.

It shall be unlawful for any person to defile any railroad car by urinating therein or by passing therein excreta.

Any person, firm, or corporation who shall violate any provision of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars or imprisoned not to exceed thirty days. (1925, cc. 114, 213.)

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CHAPTER 119**PUBLIC HOSPITALS**

See notes to section 7075.

## ART. 2. MUNICIPAL HOSPITALS

**§ 7272. Conditions and privileges of physicians to practice in public hospitals to be determined by the trustees.**

The board of trustees of such hospitals shall determine the conditions under which the privileges of practice within the hospital may be available to physicians, and shall promulgate reasonable rules and regulations governing the conduct of physicians and nurses while on duty in said hospital. (1913, c. 42, s. 14; 1925, c. 177.)

**Editor's Note.**—Formerly the section provided that no discrimination should be made, and that a patient might employ his own physician.

**§ 7279. Power to establish.**

**Proceedings under Conflicting Local Act Invalid.**—Where the county commissioners have proceeded under a special local act to submit to its electorate the question of erecting and maintaining a tuberculosis hospital, to issue \$150,000 in bonds therefor, and levy an additional tax of eight cents on the \$100 valuation of its property for maintenance, their action thus taken cannot be sustained under the provisions of the general law, C. S., ch. 119, this section et seq., authorizing an expenditure for the purpose of not exceeding \$100,000, and a maintenance tax not to exceed five cents, the balloting also under the general law differing from that in the special act in requiring separate ballots to be taken in two boxes instead of one. *Proctor v. Com'rs*, 182 N. C. 56, cited and distinguished. *Armstrong v. Board of Commissioners*, 185 N. C. 405, 117 S. E. 388.

**§ 7280. Election for bond issue; special tax.**

The board of county commissioners of any county in the state



may, by majority vote of the board, or upon petition of one-fourth of the freeholders of the county shall, after thirty days notice at the courthouse door and publication in one or more newspapers published in the county, order an election to be held at the next general election, or order a special election to be held at such time as they may fix, to determine the will of the people of the county whether there shall be issued and sold bonds to an amount not to exceed [two hundred and fifty thousand dollars], to bear interest at such rate as the board may fix and to be payable, both principal and interest, when and where they may decide. The proceeds of the bonds to be used in securing lands and erecting or altering buildings and equipping same, to be used as a hospital for the treatment of tuberculosis. If the majority of the qualified voters at said election shall vote in favor of the issuing of such bonds, then the bonds shall be issued and sold by the board and a special tax shall be levied to pay the interest and to provide a sinking fund to pay the bonds at maturity. The board of commissioners are also authorized to levy a special annual tax not to exceed five cents on the one hundred dollars valuation of property and fifteen cents on the poll to be used as a maintenance fund for the hospital for tuberculosis. The question of levying such special tax shall be submitted to the qualified voters of such county at an election to be held as hereinbefore provided. [In the event the board of commissioners shall order a special election to determine the will of the people of the county upon the question of the issuance of the bonds or the levy of the special maintenance tax as herein provided, they may order a new registration of the qualified voters of the county for said election, and notice of said new registration shall be deemed to be sufficiently given by publication once in some newspaper published in said county at least thirty days before the close of the registration books. If both questions are submitted at the same election, only one registration need be ordered. The published notice of registration shall state the days on which the books will be open for registration of voters and the places at which they will be open on Saturdays. The books of such new registration shall close on the second Saturday before election. The Saturday before the election shall be challenge day.] (1917, c. 99, s. 2; 1919, c. 159, s. 2; 1924, c. 74; 1925, c. 75.)

**§ 7282. Board of managers; term of office; compensation.**

For each hospital so established, the board of county commissioners shall, by a majority vote, elect a board of managers to consist of five members, of whom one shall be a member of said board of commissioners and shall be chairman of said board of managers. None of the remaining four members of said board of managers shall be a member of the board of commissioners. The chairman of said board of managers shall be elected for a term of two years, and the other members of said board of managers shall be elected for terms of four years: *Provided*, that at the first election of said board of

managers the chairman shall be elected for a term equal to the unexpired portion of his term as a member of the board of commissioners, and of the remaining members of said board of managers one member shall be elected for a term of one year, one member for a term of two years, one member for a term of three years, and one member for a term of four years: *Provided*, also, that any vacancy in said board, occurring at any time, shall be filled by the board of commissioners for the unexpired term. In all counties having a health officer, such health officer, in addition to the five elected members, shall be *ex officio* a member of such board of managers. Women shall be eligible to said board of managers. The compensation of the members of said board of managers shall be the same as that of the members of the board of commissioners: *Provided*, that in counties in which the chairman of the board of commissioners receives a fixed salary, and the remaining members of said board are compensated upon the basis of per diem and mileage, the compensation of the members of the board of managers shall be equal to that of the members of the board of commissioners, paid upon a per diem and mileage basis. The chairman of the board of managers shall be entitled to the same compensation as other members of said board, in addition to his compensation as a member of the board of commissioners. The county health officer, however, shall not receive compensation as a member of said board of managers: *Provided*, that this section shall not affect the present term of office of any member of a board of managers elected prior to the passage of this section, but as to such members this section shall become effective as their present terms of office, respectively, shall expire. (1917, c. 99, s. 4; 1925, c. 313, s. 1.)

**Editor's Note.**—The provisions as to the membership of one of the commissioners, and the proviso as to per diem compensation are new.

### § 7283. Powers of board; title to property.

Authority in regard to the purchase of lands, election and maintenance of buildings, selection of officers, employees, and attendants, formulation of rules and regulations for the admission and government of patients, and general conduct of the hospital, shall vest in the board of managers. No one related by blood or marriage to any member of the board of managers shall be appointed to any office or position in connection with the hospital, except by unanimous vote of the board of managers. All property, both real and personal, pertaining to such hospital, shall be vested in the county: *Provided*, however, that any donations, bequests, or devises made for the use of such hospital shall be held by the county in trust according to the terms of such donation, devise, or bequest. [*Provided*, that the board of commissioners, in their discretion, either may appoint the board of managers following the official determination of the election, in which event said board of managers shall have the sole authority as to the selection of a site for such hospital, the purchase of lands therefor, and the erecting and equipping of the buildings for such hospital; or the said board of commissioners may defer the ap-



pointment of said board of managers until such hospital is constructed, in which event said board of commissioners shall, themselves, select the site for such hospital, purchase lands therefor, erect and equip, or make contracts for erecting and equipping the buildings for such hospital, and shall thereafter turn such hospital over to said board of managers to be operated and maintained in accordance with this article.] (1917, c. 99, s. 5; 1925, c. 313.)

### § 7284. Contract power; regulations for admission.

The board of county commissioners, or the board of managers, according to the authority vested in them by the board of county commissioners or by this article, shall have power and authority to purchase property, both real and personal, to make contracts, to formulate, change, and alter rules and regulations for the admission and government of patients, and to do all things reasonably incidental or necessary to carry out the true intent and purpose of this article. Patients may be admitted and kept without charge or for such compensation as may be deemed just and proper in each particular case: *Provided*, that no person who is not a bona fide resident of the county maintaining such hospital shall be kept for less than actual cost. The county commissioners of any county may, instead of erecting the institution in the county where the vote is taken, use a part or all of the funds in erecting and maintaining a building or buildings at the state sanatorium at Montrose, or the county commissioners may in their discretion erect and maintain a tuberculosis hospital in the county where the bonds are issued, and may also use part of the funds to erect and maintain a building or buildings at Montrose, as they may deem best. Before erecting any building or buildings at Montrose the county commissioners shall make due arrangements and enter into the necessary contract or contracts with the board having charge of the state sanatorium at Montrose. And the board having in charge the state sanatorium at Montrose is hereby authorized and empowered to make contracts with any county in the state, specifying the terms upon which such building or buildings may be erected and making such arrangements as it may deem wise for the maintenance of such buildings and the care and support of such county patients. [In case the board of commissioners of any county, or the people of any county, do not decide to issue bonds for the erection of such hospital, but do not decide to levy the special tax provided for in section seven thousand two hundred and eighty (7280) of the Consolidated Statutes, they may make arrangements with the board having in charge the State Sanatorium at Montrose for the maintenance and care of tubercular patients of such county.] (1917, c. 99, s. 6; 1919, c. 159, s. 3; 1921, c. 178; 1925, c. 313.)

## ART. 3. JOINT COUNTY TUBERCULOSIS HOSPITALS

### § 7284 (a). Authorization.

Any group of counties within the State of North Carolina shall have power and authority at any time hereafter to establish, erect,

and maintain a hospital for the care and treatment of persons suffering with the disease known as tuberculosis, as hereinafter provided in this article. (1925, c. 154, s. 1.)

**§ 7284 (b). Vote on bond issue.**

The boards of commissioners of each such group of counties in North Carolina may, by majority vote of said boards or upon petition of five per cent (5%) of the freeholders of said counties, shall, after thirty days notice at the courthouse door of each of the counties and publication in one or more newspapers published in each of said counties, order an election to be held at the next general election, or order a special election to be held at such time as they may fix, to determine the will of the people in each of the counties in the group whether there shall be issued and sold bonds to an amount not to exceed two hundred thousand dollars (\$200,000) for each county in the group, to bear interest at such rate as said boards may fix and to be payable, both principal and interest, when and where they may decide. The proceeds of said bonds to be used in securing lands and erecting or altering buildings and equipping same, to be used as a hospital for the treatment of tuberculosis. If the majority of the qualified voters in each county of the group at said election shall vote in favor of the issuing of said bonds, then said bonds shall be issued and sold by said boards and a special tax shall be levied to pay the interest on said bonds and provide a sinking fund to pay said bonds at maturity. Said boards of commissioners are hereby also authorized to levy a special annual tax not to exceed five cents on the one hundred dollars valuation of property and fifteen cents on the poll to be used as a maintenance fund for said hospital for tuberculosis. (1925, c. 154, s. 2.)

**§ 7284 (c). Ballots and boxes.**

The county commissioners at the next general election or special election shall cause to be placed at each voting precinct in the counties of the group a ballot box marked "Joint County Tuberculosis Hospital," and cause to be printed and distributed official ballots labeled "For Joint County Tuberculosis Hospital," and official ballots labeled "Against Joint County Tuberculosis Hospital," said election to be governed by the laws of the State. (1925, c. 154, s. 3.)

**§ 7284 (d). Board of managers.**

For each hospital so established there shall be elected a board of managers, consisting of two members from each county in the group and of one member at large. The two members from each county shall be elected by a majority vote of their respective board of county commissioners, and the one member at large shall be elected from any one of the counties in the group at a meeting of and by a majority vote of the combined boards of commissioners of the several counties in the group. The member at large shall hold office for



two years and the other members shall hold office for four years where there are only two counties in the group, and for six years where there are more than two counties in the group, unless sooner removed for cause by the combined boards of commissioners of the several counties in the group: *Provided*, that the commissioners of all the counties of the group at a joint meeting shall determine the length of the term of office of the various members of the board of managers first elected; one member to serve one, two, three and four years, respectively, if there are only two counties in the group; one member to serve one, two, three, four, five and six years, respectively, if there are three counties in the group; one member to serve for one, two, three and four years, respectively, and two members to serve for five and six years, respectively, where there are four counties in the group; one member to serve for one year, and one for two years, and two members for three, four, five and six years, respectively, where there are five counties in the group: *Provided, also*, that any vacancies in such board may be filled by the boards of county commissioners for the unexpired term, unless the vacancy is for the office of member at large, in which case the vacancy shall be filled for the unexpired term by the commissioners of all the counties of the group at a joint meeting. In all counties having health officers, such health officers shall, in addition to the other members, be *ex officio* members of such board of managers. Women shall be eligible for election to such board of managers. The compensation for such board shall be the same as that of the county commissioners. (1925, c. 154, s. 4.)

#### **§ 7284 (e). Authority of board.**

Authority in regard to the purchase of lands, erection and maintenance of buildings, selection of officers, employees and attendants, formulation of rules and regulations for the admission and government of patients, and general conduct of the hospital, shall vest in the board of managers; that no one related by blood or marriage to any member of the board of managers shall be appointed to any office or position in connection with the hospital, except by unanimous vote of the board of managers; that all property, both real and personal, pertaining to such hospital shall be vested jointly in the counties of the group: *Provided, however*, that any donations, bequests, or devises made for the use of such hospital shall be held by the counties in the group in trust according to the terms of such donation, devise, or bequest. (1925, c. 154, s. 5.)

#### **§ 7284 (f). Purchasing property; charges.**

The boards of county commissioners of the group, or the board of managers, according to the authority vested in them by the boards of county commissioners of the group or by this article, shall have power and authority to purchase property, both real and personal, to make contracts, to formulate, change, and alter rules and regulations for the admission and government of patients, and to do all things reasonably incidental or necessary to carry out the true in-

tent and purpose of this article. Patients may be admitted and kept without charge or for such compensation as may be deemed just and proper in each particular case: *Provided*, that no person who is not a bona fide resident of the counties maintaining such hospital shall be kept for less than actual cost. (1925, c. 154, s. 6.)

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## CHAPTER 120

### PUBLIC PRINTING

#### ART. 1. REGULATION OF PUBLIC PRINTING

##### **§ 7308 (a). Printing for state departments.**

All printing for each department of the State, except the General Assembly, the Supreme Court, the State Highway Commission, the Automobile License Bureau, the Department of Agriculture, and such other departments or divisions of departments operating on special funds, shall be furnished by the Commissioner of Labor and Printing, and paid for by him by warrants drawn by the Auditor upon the State Treasury out of the appropriation made for public printing: *Provided*, that the printing for the State Highway Commission, the Automobile License Bureau, the Department of Agriculture, and other departments and divisions of such departments operating on special funds be paid for out of such funds; and it is *further provided*, that the printing for the General Assembly and the Supreme Court be paid for as now provided by law. (1925, c. 247, s. 1.)

##### **§ 7308 (b). How supplies furnished; requisition.**

Such printing and supplies shall be furnished to each department upon a requisition, in writing, therefor, which shall be made out and signed by the department or person requiring the same, on forms prescribed and furnished by the Commissioner of Labor and Printing, and in such requisition such department, or person, shall plainly state the amount and kind of printing and supplies desired, and, as far as may be possible, shall estimate the amount of the same needed, as a six months supply, and such requisition shall be filed with the Commissioner of Labor and Printing at least sixty days before the printing and supplies asked for are needed, and the said requisition shall be so filled, and a copy thereof furnished by the Commissioner of Labor and Printing to the Budget Bureau. (1925, c. 134, s. 2.)

##### **§ 7308 (c). Allocation of appropriation.**

The said Commissioner of Labor and Printing and the Budget Bureau, in consultation with the heads of the several departments of State, shall, immediately upon the adjournment of each regular session of the General Assembly, allocate to the several departments the appropriations for public printing. (1925, c. 134, s. 3.)



**§ 7308 (d). Paper and form of printing.**

The Commissioner of Labor and Printing and the Budget Bureau, in allocating such funds and in furnishing such printing and stationery supplies, shall use their best efforts to conserve the interest of the State, and to that end shall have authority and power to use such paper and such standard forms of printing, so that the best interest of the State may be promoted, and its funds economically conserved. (1925, c. 134, s. 4.)

**§ 7308 (e). Accounts of requisitions.**

The said Commissioner of Labor and Printing shall keep an account in his office in which each department shall be credited with its allocation for printing and stationery supplies and shall be charged with the amount of each requisition therefor, when filled, and immediately upon the filling of each requisition such department shall be advised by the Commissioner of Labor and Printing as to the status of such account, and no requisition shall be filled, or allowed, in whole or in part, so as to exceed said allotment. (1925, c. 134, s. 5.)

**§ 7308 (f). Application of preceding sections.**

Sections 7308 (a) to 7308 (e) shall apply to all legislative appropriations for public printing made by the regular session of the General Assembly one thousand nine hundred and twenty-five, and thereafter, and the allocations or allotments of the same shall be made so as to allot, immediately after the adjournment of the present session of the General Assembly, the said public printing appropriation, and to the end that the requisition of the first six months of the next fiscal biennium shall be made and filled hereunder. The said sections shall not apply to the needs of the several departments for printing and stationery supplies for the period ending June thirtieth, one thousand nine hundred twenty-five. The said sections shall not apply to issuance and the printing of the current volumes of the Supreme Court reports and the advance sheets containing the opinions of the Supreme Court, which shall remain under the supervision of the Chief Justice of the Supreme Court. (1925, c. 134, ss. 6, 6a.)

**ART. 3. FREE EMPLOYMENT BUREAU****§ 7312 (b). Duty of commissioner of labor and printing.**

It shall be the duty of the commissioner of labor and printing and he shall have the power, jurisdiction, and authority:

(a) To establish and conduct free employment offices in the state where in the opinion of the commissioner such action may be deemed advisable and expedient; to in all proper ways within the limitations of this article bring together employers seeking employees and applicants for employment seeking employers; to make known the opportunities of self-employment in the state; to devise and adopt the

most efficient means to avoid unemployment; to cooperate with existing state and federal agencies in extending vocational guidance to minors seeking employment.

(b) To establish and maintain such sections of the employment service as will best serve the public welfare.

[(c) To aid and assist veterans of the World War in securing the adjustment of claims against the Federal government.] (1921, c. 131, s. 2; 1925, c. 288.)

## ART. 5. REGULATION OF EMPLOYMENT AGENCIES

### § 7312 (n). Licensing.

No person, firm or corporation shall operate or conduct a private employment agency in North Carolina without first having been licensed to conduct such business by the Commissioner of Labor and Printing. The Commissioner of Labor and Printing is authorized and empowered to make general rules and regulations in relation to the licensing of such employment agency not inconsistent with this article. Said license shall on its face contain the following conditions:

(1) That the employment agency shall not charge any initial fee for its services.

(2) That the fee for temporary employment shall not exceed ten per cent of the first month's wages. Temporary employment is hereby defined to be employment that does not extend beyond sixty days. If the employment is permanent, then said agency shall not charge more than fifteen per cent of the first month's wages. Permanent employment is hereby defined to be all employment exceeding sixty days. (1925, c. 127, s. 1.)

### § 7312 (o). Inspection of agencies; revocation of license.

The said Commissioner of Labor and Printing is expressly authorized and empowered, by himself or his employee or agent, duly authorized by him to that effect, to inspect the books of said employment agency whenever he deems it best to do so to effectuate the purpose of this article, and to rescind a license theretofore granted by him if upon such inspection and supervision he finds that such employment agency has not complied with the conditions upon which it was licensed by him to do such business. Said Commissioner of Labor and Printing may rescind such license after such investigation by himself or his employee or agent upon information so obtained without further notice to the employment agency. If, however, he acts upon evidence outside of that obtained in this way, he can rescind such license only after giving its holder ten days notice of his purpose to investigate and after a hearing at the time fixed, and at the hearing a determination by him that such employment agency has broken the conditions under which it is licensed. Such



employment agency shall at the time of its receiving said license from the Commissioner of Labor and Printing pay into his office at the cost of the same one dollar for each license. (1925, c. 127, s. 2.)

**§ 7312 (p). Violation; penalty.**

Any person, firm or corporation conducting an employment agency in the State of North Carolina without having been duly licensed thereto by the State Commissioner of Labor and Printing shall be guilty of a misdemeanor and, if a person, punishable at the discretion of the court; if a corporation, shall be fined not less than two hundred and fifty dollars nor more than one thousand dollars. (1925, c. 125, s. 3.)

**§ 7312 (q). Application of article; distribution of copies.**

This article is limited to employment agencies only which hold themselves out for public service.

Immediately upon the ratification of this article the Commissioner of Labor and Printing shall have an adequate number of copies of the same printed and shall send to each employment agency in the State one or more of such copies.

This article shall in no wise conflict with or affect any license tax imposed upon such employment agencies by the Revenue Act of one thousand nine hundred and twenty-five, but instead, shall be construed as supplemental thereto in the exercise of the police power of the State and not as a revenue measure. (1925, c. 127, ss. 4, 5, 6.)

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CHAPTER 121

**REFORMATORIES**

ART. 1. STONEWALL JACKSON MANUAL TRAINING AND  
INDUSTRIAL SCHOOL

**§ 7313. Incorporation.**

The board of trustees of the Stonewall Jackson Manual Training and Industrial School is hereby declared a body corporate, by which name they may sue and be sued, plead and be impleaded, hold, use, sell and convey real estate, receive donations, gifts and appropriations and do all other things necessary and requisite for the purpose of carrying out the intent and purposes for which it is organized. (1907, c. 509, s. 1; 1907, c. 955; 1925, c. 306, s. 1.)

**Editor's Note.**—No material change is made in this section by the Act of 1925, except the omission of the names of certain individual trustees.

**§ 7316. Appointment of trustees; vacancies.**

The board of trustees of the Stonewall Jackson Manual Training and Industrial School shall consist of eleven (11) persons, whose terms of office shall be four years from the date of their appointment as herein provided for. Within thirty days after March 10, 1925 the Governor shall name and appoint six (6) members of the board of trustees, and within six months from March 10, 1925 the Governor shall name five (5) other members of the said board. At the time of naming and appointing the members as herein provided the Governor shall designate which of the present board are to be succeeded by his nominees and appointees. Should any vacancy occur in the said board, the Governor shall fill the same by appointment. The superintendent of the school shall from time to time notify the Governor as to any vacancies which shall occur and the expiration of the term of office of the members of the board. The Governor shall transmit to the Senate at the next session of the General Assembly following his appointment the names of the persons appointed by him for confirmation. (1907, c. 509, s. 6; 1907, c. 955, s. 2; 1925, c. 306, s. 2.)

**Editor's Note.**—Formerly the board consisted of 15 trustees divided into classes according to the expiration of their terms, which were for six years. Some of the trustees were elected by the board. Now there are eleven trustees, all appointed by the governor in the same year for the term of four years. For removal of the officers provided for in this section see section 5912(h).

**ART. 2. STATE HOME AND INDUSTRIAL SCHOOL FOR GIRLS AND WOMEN.****§ 7330. Board of managers; term of office; compensation.**

The State Home and Industrial School for Girls and Women shall be under the control and management of a board of five (5) managers; three of whom shall be women and two of whom shall be men. All managers shall be appointed by the Governor, and the term of each manager shall be four years from and after the date of his or her appointment. Within thirty days from March 10, 1925 the Governor shall appoint three managers and within six months he shall appoint the remaining two. At the time of making the appointments he shall name which of the present managers are to be succeeded by his appointees. All vacancies occurring shall be filled by the Governor. The Governor shall transmit the names of his appointees to the Senate at the next session of the General Assembly for confirmation. Each member of the board shall be entitled to receive his or her necessary expenses while engaged in the business of the institution. (1917, c. 255, s. 2; 1925, c. 306, s. 4.)

**Editor's Note.**—Under the former section one of the managers was appointed each year for a term of five years. Now all are appointed in the same year for a term of four years. For removal of the officers provided for in this section see section 5912(h).



## ART. 3. REFORMATORIES OR HOMES FOR FALLEN WOMEN.

**§ 7345. Power to purchase land, erect buildings, and maintain the institution.**

The said city and county are authorized jointly to purchase a tract of land, not exceeding one hundred acres, for the use of such reformatory or home, the title to which shall be vested jointly in the city and county, and the reformatory shall be managed jointly by such city and county. The city and county are authorized to build such buildings and improvements on the land so purchased, to keep and maintain such reformatory or home for fallen women, and to make all necessary appropriations for buildings and keeping and caring for the inmates thereof: Provided, however, the cost of said buildings shall not exceed the sum of [forty thousand] dollars, and the maintenance and upkeep and operating expenses per annum shall not exceed the sum of [twenty thousand] dollars. (1917, c. 264, s. 1; 1919, c. 33; 1925, c. 176.)

## ART. 4. EASTERN CAROLINA INDUSTRIAL TRAINING SCHOOL FOR BOYS.

**§ 7362 (b). Trustees; appointments; terms; expenses.**

The Eastern Carolina Industrial School for Boys shall be under the control and management of a board of five trustees. The said trustees shall be appointed by the Governor of the State and the term of each trustee shall be four years from and after the date of his or her appointment. Within thirty days after March 10, 1925 the Governor shall appoint three of the trustees and within six months after March 10, 1925 the Governor shall appoint the remaining two. At the time of making the appointment the Governor shall designate which of the present trustees are to be succeeded by his appointees. All vacancies occurring in the board shall be filled by the Governor. The Governor shall transmit to the Senate at the next session of the General Assembly the names of his appointees for confirmation. Each member of the board shall be entitled to receive necessary expenses for each and every day engaged in the business of the institution. (1923, c. 254, s. 2; 1925, c. 306, s. 5.)

**Editor's Note.**—The trustees were formerly appointed in classes in different years. They are now all appointed in the same year.

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CHAPTER 125.**STATE DEBT**

## ART. 1. FUNDED DEBT.

**§ 7407. No charge for registration.**

There shall be no charge for the registration of any bond or certificate whether registered at the time of issuance thereof or sub-

sequently registered, and no charge for the transfer of registered bonds and certificates shall be made (Rev., s. 5027; 1887, c. 2887, ss. 4, 5; 1921, c. 66, s. 6; 1925, c. 49.)

**Editor's Note.**—Formerly a fee was charged for registration after the original issuance and for the transfer of bonds or certificates.

### **§ 7412 (a). What officers may sign bonds.**

State bonds duly authorized by law and approved by the Governor and Council of State shall be regarded as duly executed by proper officers if signed and sealed while in office by the officer or officers then authorized to sign and seal the same, notwithstanding one or more of such officers shall not be in office at the time of actual delivery of such bonds. (1925, ch. 2.)

### **§ 7413 (a). Issuance of temporary bonds.**

Whenever the State Treasurer shall be authorized by law to issue bonds or notes of the State, and all acts, conditions and things required by law to happen, exist and be performed, before the delivery thereof for value, shall have happened, shall exist and shall have been performed, except the printing, lithographing or engraving of the definitive bonds or notes authorized and the execution thereof, the State Treasurer is authorized, by and with the consent of the Governor and Council of State, to issue and deliver for value temporary bonds or notes, with or without coupons, which may be printed or lithographed in any denomination or denominations which may be a multiple of one thousand dollars, and shall be signed and sealed as shall be provided for the signing and sealing of such definitive bonds or notes, and shall be substantially of the tenor of such definitive bonds or notes except as herein otherwise provided and except that such temporary bonds or notes shall contain such provisions as the treasurer may elect as to the conditions of payment of the semiannual interest thereon. Every such temporary bond or note shall bear upon its face the words "Temporary Bond (or Note) Exchangeable for Definitive Bond." Upon the completion and execution of the definitive bonds or notes, such temporary bonds or notes shall be exchangeable without charge therefor to the holder of such temporary bonds or notes for definitive bonds or notes of an equal amount of principal. Such exchange shall be made by the treasurer or by a bank or trust company in North Carolina or elsewhere appointed by him as agent which shall have a capital and surplus of not less than the amount of the definitive bonds or notes to be so exchanged, and in making such exchange the treasurer shall detach from the definitive bonds or notes all coupons which represent interest theretofore paid upon the temporary bonds or notes to be exchanged therefor, and shall cancel all such coupons; and upon such exchange such temporary bonds or notes and the coupons attached thereto, if any, shall be forthwith canceled by the treasurer or such agent. Until so exchanged, temporary bonds and notes issued under the authority hereof shall in all respects be entitled to all the rights and privileges of the definitive securities. (1925, c. 43.)



## ART. 1A. GENERAL FUND NOTES

**§ 7432 (a). Note issue authorized.**

For the purpose of balancing the revenues and disbursements of the general fund at the close of the current fiscal year on June thirty, one thousand nine hundred and twenty-five, and of facilitating the placing of the fiscal operations of the State upon a budgetary basis, whereby the cash revenues collected in each fiscal year may be made applicable to and sufficient for the cash expense disbursements of the same period, the State Treasurer is hereby authorized and directed, by and with the consent of the Governor and Council of State, to issue and sell notes of the State, to be designated "General Fund Notes," bearing such date or dates and such rate or rates of interest, not exceeding five per cent per annum payable semi-annually, as may be fixed by the Governor and Council of State. The notes hereby authorized shall mature in such amounts and in annual series, beginning not more than two years nor running longer than ten years from their date or respective dates of issue, as may be fixed by the Governor and Council of State. The aggregate principal amount of said notes shall not exceed the amount the State Auditor shall certify to the Governor and Council of State to be the debit balance resulting from current operations of the general fund June thirty, one thousand nine hundred and twenty-five, after deducting therefrom the sum of (one million two hundred fifty-four thousand five hundred dollars) representing the amount of disbursements from the general fund for permanent improvements to various State institutions and the interest upon such disbursements: *Provided, however*, that such notes may be issued in the aggregate amount of five million dollars, notwithstanding the State Auditor shall not have so certified, it now being known that said debit balance will at least equal the sum of five million dollars. (1925, c. 112, s. 2.)

**§ 7432 (b). Interest; form; denomination.**

Said notes shall carry interest coupons which shall bear the signature of the State Treasurer, or a facsimile thereof, and said notes shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and the form and denomination thereof shall be such as the State Treasurer may determine in conformity with this article. (1925, c. 112, s. 3.)

**§ 7432 (c). Sale of notes.**

Subject to determination by the Governor and Council of State as to the manner in which said notes shall be offered for sale, whether by publishing notices in certain newspapers and financial journals or by mailing notices or by inviting bids by correspondence or otherwise, the State Treasurer is authorized to sell said notes at one time or from time to time at the best price obtainable, but in no case for less than par and accrued interest, and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina.

All expenses necessarily incurred in the preparation and sale of the notes shall be paid from the proceeds of such sale. (1925, c. 112, s. 4.)

**§ 7432 (d). Proceeds of notes.**

The proceeds of said notes shall be placed by the Treasurer in the general fund. (1925, c. 112, s. 5.)

**§ 7432 (e). Borrowing money to pay interest.**

By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, for the payment of interest upon or any installment of principal of any of the notes authorized by section 7432(a) then outstanding, if there shall not be sufficient funds in the State Treasury with which to pay such interest or installment as they respectively fall due, and for the renewal, from time to time, of any loan evidenced by the notes authorized by this section. Interest payments upon the notes authorized by this section may be evidenced by interest coupons in the Treasurer's discretion. (1925, c. 112, s. 6.)

**§ 7432 (f). Faith of state pledged.**

The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of all the notes herein authorized. (1925, c. 112, s. 7.)

**§ 7432 (g). Coupons receivable for debts due state.**

The coupons of all said notes after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 172, s. 8.)

**§ 7432 (h). Exemption from taxation.**

All of said notes and coupons shall be exempt from all State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said notes shall not be subject to taxation as for income, nor shall said notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company or other corporation. (1925, c. 112, s. 9.)

**§ 7432 (i). Fiduciaries may invest in notes.**

It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in any of said notes. (1925, c. 112, s. 10.)



## ART. 11 (A). ADDITIONAL BONDS FOR STATE INSTITUTIONS.

**§ 7472 (q) 1. Issue authorized.**

For the permanent enlargement, improvement and equipment of the educational, charitable, and correctional institutions and buildings of the State hereinafter mentioned, and for reimbursement to the general fund of moneys paid therefrom for the permanent improvement of certain of such institutions and interest thereon, the State Treasurer is hereby authorized and directed, by and with the consent of the Governor and Council of State, to issue and sell five million one hundred and twenty-five thousand dollars (\$5,125,000) bonds of the State, bearing such date or dates and such rate or rates of interest not exceeding five per cent per annum, payable semiannually, as may be fixed by the Governor and Council of State, all of which bonds shall mature at one date in the year nineteen hundred and sixty-six (1966). (1925, c. 192, s. 2.)

**§ 7472 (q) 2. Form of bonds.**

Said bonds shall carry interest coupons which shall bear the signature of the State Treasurer, or a facsimile thereof, and said bonds shall be subject to registration and be signed and sealed as is now or may hereafter be provided by law for State bonds, and the form and denomination thereof shall be such as the State Treasurer may determine in conformity with this article. (1925, c. 192, s. 3.)

**§ 7472 (q) 3. Sale of bonds.**

Before selling the bonds herein authorized to be issued, the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem most effectual to secure the best price. He is authorized to accept bids for the entire amount of said bonds, or any portion thereof, and when the conditions are equal he shall give the preference of purchase to the citizens of North Carolina; and he is empowered to sell the bonds herein authorized in such manner as in his judgment will produce the best price, but not for less than par and accrued interest. (1925, c. 192, s. 4.)

**§ 7472 (q) 4. Proceeds of bonds.**

The proceeds of said bonds and of the bond anticipation notes herein authorized (except the proceeds of bonds the issuance of which has been anticipated by such bond anticipation notes) shall be placed by the Treasurer in a special fund to be designated "Permanent Improvement Fund one thousand nine hundred and twenty-five," and be disbursed only for the purposes provided in this article upon warrants drawn by the State Auditor, which warrants shall not be drawn for any institution or State buildings until the governing body or authority in charge thereof shall certify that an expense has been incurred justifying the issuance thereof. Any executive head of any institution or any director, trustee or commissioner in any State institution or commission who votes for or aids in spending more money for public improvements for his institution than is hereby appropriated may be removed from office by the Governor. (1925, c. 192, s. 5.)

**§ 7472 (q) 5. Disbursement of proceeds.**

The proceeds of such bonds and bonds anticipation notes shall be disbursed as herein provided in the following and for the following purposes:

(a) To reimburse the General Fund for principal and interest paid out of said fund for permanent improvements at the charitable and other institutions of the State prior to January first, one thousand nine hundred and twenty-five, and which was authorized by various laws of the General Assembly, amounting to one million, two hundred fifty-four thousand, five hundred (\$1,254,500) dollars.

(b) For the permanent improvement, enlargement and equipment of the following institutions and buildings of the State:

## EDUCATIONAL INSTITUTIONS.

University of North Carolina .....	\$ 800,000
State Agricultural and Engineering College .....	600,000
N. C. College for Women .....	700,000
East Carolina Teachers' College .....	250,000
Negro Agricultural and Technical College .....	40,000

## STATE BOARD OF EDUCATION FOR NORMALS

Cullowhee Normal School .....	90,000
Appalachian Normal School .....	90,000
Cherokee Indian Normal School .....	50,000
Public School Buildings (Indians), Robeson County.....	30,000
Elizabeth City Normal (Negro) and Fayetteville Normal (Negro) and [State Normal (Negro) and]	
Durham State Normal (Negro) .....	120,000

## CHARITABLE AND CORRECTIONAL INSTITUTIONS

State Hospital, Raleigh .....	\$ 73,000
Criminal Insane .....	50,000
State Hospital, Morganton .....	133,000
State Hospital, Goldsboro .....	50,000
Criminal Insane .....	25,000
Caswell Training School .....	69,000
North Carolina School for Deaf, Morganton .....	5,000
School for Blind and Deaf, Raleigh .....	50,000
Orthopaedic Hospital, Gastonia .....	6,500
Tuberculosis Sanatorium in Moore County .....	137,000
Stonewall Jackson Training School .....	35,000
Samarcand Training School for Girls .....	14,000
East Carolina Industrial School .....	10,000

## STATE PRISON

Central Prison .....	149,000
Caledonia Farm .....	85,000
Cary Farm .....	20,000
Confederate Women's Home .....	26,500

Total .....	\$3,708,000
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- (c) For use of Committee on Public Buildings and Grounds for improvement and equipment of the Governor's Mansion .....\$ 50,000
- (d) To reimburse the general fund for permanent improvements made at the State Prison prior to January first, one thousand nine hundred and twenty-five, heretofore paid by the State Prison .....\$ 112,500  
(1925, c. 192, s. 6; 1925, c. 259.)

### § 7472 (q) 6. Notes in anticipation of bonds.

By and with the consent of the Governor and Council of State, who shall determine the rate or maximum rate of interest and the date or approximate date of payment, the State Treasurer is hereby authorized to borrow money at the lowest rate of interest obtainable, and to execute and issue notes of the State for the same, but only in the following circumstances and under the following conditions:

(a) For anticipating the sale of any of said bonds to the issuance of which the Governor and Council of State shall have given consent, if the Treasurer shall deem it advisable to postpone the issuance of such bonds.

(b) For the payment of interest upon or any installment of principal of any of said bonds then outstanding if there shall not be sufficient funds in the State Treasury with which to pay such interest or installments as they respectively fall due.

(c) For the renewal of any loan evidenced by notes herein authorized. (1925, c. 192, s. 7.)

### § 7472 (q) 7. Payment of notes.

Notes issued in anticipation of the sale of said bonds shall be paid with funds derived from the sale of the bonds unless otherwise provided for by the General Assembly, and notes issued for the payment of interest and installments of principal shall be paid from funds provided by the General Assembly for the payment of such interest and principal when such funds are collected. Interest payments upon said notes may be evidenced by interest coupons in the Treasurer's discretion. (1925, c. 192, s. 8.)

### § 7472 (q) 8. Faith of state pledged.

The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the bonds and notes herein authorized. (1925, c. 192, s. 9.)

### § 7472 (q) 9. Coupons receivable for debts due state.

The coupons of said bonds and notes after maturity shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 192, s. 10.)

### § 7472 (q). 10. Exemption from taxation.

All of said bonds and notes and coupons shall be exempt from all

State, county and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, and the interest on said bonds and notes shall not be subject to taxation as for income, nor shall said bonds or notes or coupons be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1925, c., 192 s. 11.)

**§ 7472 (q) 11. Investments by fiduciaries.**

It shall be lawful for all executors, administrators, guardians and fiduciaries generally, and all sinking fund commissions, to invest any moneys in their hands in said bonds and notes. (1925, c. 192, s. 12.)

**§ 7472 (q) 12. Sinking fund created.**

For the retirement of the principal of said bonds at maturity a sinking fund is hereby created, into which fund the State Treasurer shall pay during each fiscal year, beginning with the year ending June thirtieth, one thousand nine hundred and twenty-seven, from any funds not heretofore pledged or appropriated, the sum of fifty-one thousand, two hundred and fifty (\$51,250) dollars. (1925, c. 192, s. 13.)

ART. 11 (B). SINKING FUND COMMISSION

**§ 7472 (q) 13. Creation; duties.**

A State Sinking Fund Commission is hereby created, the members of which shall be the Governor, State Treasurer and Auditor, who shall serve without additional compensation. It shall be the duty of the commission to see that the provisions of all sinking fund laws are complied with and to provide for the custody, investment and application of all sinking funds. The commission and its members may call upon the Attorney-General for legal advice as to their duties, powers and responsibilities hereunder. (1925, c. 62, s. 2.)

**§ 7472 (q) 14. To adopt rules; organization.**

The commission shall adopt rules for its organization and government and the conduct of its affairs. Its chairman shall be the Governor and its secretary the Auditor. All clerks and employees in the office of the Governor, Auditor and Treasurer may be called upon to assist the commission. (1925, c. 62, s. 3.)

**§ 7472 (q) 15. Treasurer of commission; liability.**

The State Treasurer shall be ex officio treasurer of the commission and the custodian of the sinking fund and the investments thereof. He and the sureties upon his official bond as State Treasurer shall be liable for any breach of faithful performance of his duties under this article as well as his duties as State Treasurer, and his official bond shall be made to comply with this requirement. (1925, c. 62, s. 4.)



**§ 7472 (q) 16. Investment of sinking funds.**

Moneys in the sinking funds herein shall not be loaned to any department of the State, but shall be invested by the commission in:

- (a) Bonds of the United States;
- (b) Bonds or notes of the State of North Carolina;
- (c) Bonds of any other state whose full faith and credit are pledged to the payment of the principal and interest thereof;
- (d) Bonds of any county in North Carolina having a population of fifteen thousand or more, any city or town in North Carolina having a population of four thousand or more, and any school district in North Carolina having a population of two thousand five hundred or more, provided such bonds are general obligations of the subdivision or municipality issuing the same and provided that there is no limitation of the rate of taxation for the payment of principal and interest of the bonds; such population of counties, cities and towns shall be determined by the last preceding Federal census, but in the case of school districts shall be determined by the commission. (1925, c. 62, s. 5.)

**§ 7472 (q) 17. Purchase of securities.**

No such securities shall be purchased at more than the market price thereof, nor sold at less than the market price thereof. No securities shall be purchased except bonds of the United States or bonds or notes of the State of North Carolina unless the vendor shall deliver with the securities the opinion of an attorney believed by the commission to be competent and to be recognized by investment dealers as an authority upon the law of public securities, to the effect that the securities purchased are valid obligations and are securities which the commission is authorized to purchase, it being the intention of this requirement to assure the commission not only that such securities are valid and eligible for purchase under this act but that the same shall not be unsalable by the commission because of doubts as to the validity thereof. The commission is empowered to appoint one or more of its members for the purpose of making purchases and sale of securities. (1925, c. 62, s. 6.)

**§ 7472 (q) 18. Interest of securities held as part of sinking fund.**

The interest and revenues received upon securities held for any sinking fund and any profit made on the resale thereof shall become and be a part of such sinking fund. Bonds and notes of the State of North Carolina purchased for any sinking fund shall not be canceled before maturity, but shall be kept alive, and the interest and principal thereof shall be paid into the sinking fund for which the same are held. (1925, c. 62, s. 7.)

**§ 7472 (q) 19. Registration of securities; custody thereof.**

Where practicable securities purchased for sinking funds shall be registered as to the principal thereof in the name of "The State of

North Carolina for the sinking fund for" (here briefly identify the sinking fund) and may be released from such registration by the signature of the State Treasurer, but the treasurer shall not make such release unless and until the securities to be so released shall have been sold by the commission or until the commission shall have ordered such release. The treasurer shall rent a safety deposit box or boxes in some responsible bank in Raleigh in which he may keep all securities purchased for sinking funds and in which it shall be his duty to keep all such securities not registered as to the principal thereof. (1925, c. 62, s. 8.)

#### **§ 7472 (q) 20. Expenses of commission.**

The necessary expense of the commission for the rental of a safety deposit box, publication of advertisements, postage, insurance upon securities in transit, etc., not exceeding one-twentieth of one per cent of the amount in all sinking funds at the end of any fiscal year, shall be a charge upon the general fund. (1925, c. 62, s. 9.)

#### **§ 7472 (q) 21. Report of commission.**

The commission shall make a report in writing to the General Assembly not later than the tenth day of each regular and extraordinary session thereof, stating the nature and amount of all receipts and disbursements of each sinking fund since the last preceding report, and the amount contained in each fund, and giving an itemized statement of all investments of each fund as to name of security, purpose of issuance, date of maturity and interest rate, which report shall be spread upon the journals of the Senate and House of Representatives. (1925, c. 62, s. 10.)

#### **§ 7472 (q) 22. Embezzlement by member of commission.**

If any member of the commission shall embezzle or otherwise willfully and corruptly use or misapply any funds or securities in any sinking fund for any purpose other than that for which the same are held, such member shall be guilty of a felony, and shall be fined not more than ten thousand dollars, or imprisoned in the State's Prison not more than twenty years, or both, at the discretion of the court. (1925, c. 62, s. 11.)

#### **§ 7472 (q) 23. False entry by secretary or treasurer.**

If the secretary or treasurer of the commission shall wittingly or falsely make, or cause to be made, any false entry or charge in any book kept by him as such officer, or shall wittingly or falsely form, or cause to be formed, any statement of the condition of any sinking fund, or any statement required by this act to be made, with intent in any of said instances to defraud the State, or any person or persons, such secretary or treasurer, as the case may be,



shall be guilty of a misdemeanor and fined at the discretion of the court not exceeding three thousand dollars, and imprisoned for not exceeding three years. (1925, c. 62, s. 12.)

**§ 7472 (q) 24. Interest of member in securities; removal.**

If any member of the commission shall have any pecuniary interest, either directly or indirectly, proximately or remotely, in any securities purchased or sold by the commission, or shall act as agent for any investor or dealer for any securities to be purchased or sold by the commission, or shall receive directly or indirectly any gift, emolument, reward, or promise of reward for his influence in recommending or procuring any such purchase or sale, he shall forthwith be removed from his position, and shall upon conviction be guilty of a misdemeanor, and fined not less than fifty dollars nor more than five hundred dollars, and be imprisoned, in the discretion of the court. (1925, c. 62, s. 13.)

**§ 7472 (q) 25. Report of sufficiency of sinking fund.**

When the funds or securities in any sinking fund shall be found by the sinking fund commission to be sufficient with interest accretions reasonably to be expected for the retirement at maturity of all bonds for which such sinking fund is held, and when the commission shall file a statement of such finding in the office of the Auditor and in the office of the State Treasurer, further payments into such sinking fund shall be suspended and shall not again be made unless such fund should thereafter become insufficient for any reason. (1925, c. 62, s. 18.)

ART. 12. SINKING FUNDS FOR CERTAIN STATE BONDS.

**§ 7472 (r). Institution bonds; annual payments into fund.**

For the retirement of the principal of bonds of the state for permanent enlargement of its educational and charitable institutions, issued and to be issued under articles 10 and 11 of this chapter, a sinking fund is created, into which fund the state treasurer shall pay during the [fiscal year ending June 30, 1924], from any fund not heretofore pledged or appropriated, the sum of one hundred and sixty-three thousand dollars or such greater amount as may be necessary to retire said bonds. (1923, c. 188. s. 1; 1925, c. 62, s. 14.)

**§ 7472 (s). Highway bonds; annual payments.**

For the retirement of the principal of nineteen million five hundred thousand dollars highway serial bonds heretofore issued under chapter two, Public Laws of one thousand nine hundred and twenty-one, Regular Session, a sinking fund is created, into which fund the state treasurer shall pay during [the fiscal year ending

June 30, 1924], from any funds not heretofore pledged or appropriated, the sum of one hundred thousand dollars. (1923, c. 188, s. 2; 1925, c. 62, s. 15.)

**§ 7472 (t). Highway bonds not issued; annual payments.**

For the retirement of the principal of bonds issued for highway purposes, chapter two, Public Laws of one thousand nine hundred and twenty-one, Regular Session, over and above the nineteen million five hundred thousand dollars heretofore issued, a sinking fund is hereby created, into which fund the state treasurer shall pay during [the fiscal year ending June 30, 1924], from any funds not heretofore pledged or appropriated, the sum of four hundred thousand dollars. (1923, c. 188, s. 3; 1925, c. 62, s. 16.)

**§ 7472 (u). Source of funds.**

All of the highway bond sinking fund payments to be made under sections 7472(s) and 7472(t), aggregating five hundred thousand dollars (\$500,000) annually, shall be made from the revenues collected under the provisions of said chapter two (2) public law of one thousand nine hundred and twenty-one, if such revenues are sufficient therefor after setting aside therefrom the moneys provided by said chapter two (2) for the maintenance of the State Highway Commission and the expenses of collecting highway revenues, and after setting aside moneys necessary for the payment of maturing principal of and interest upon highway bonds of the State: *Provided, however*, that no holder of any highway bonds of the State shall be prejudiced by this amendment or by any act amendatory of this section passed subsequent to the issuance of such bonds, and any such bondholder shall be entitled to all rights to which he would be entitled if no such amendment had been made. (1923, c. 188, s. 4; 1925, c. 45, s. 4; 1925, c. 133, s. 4.)

**Editor's Note.**—Prior to the Act of 1925 the amount to be raised from revenue under "said chapter two" (Acts 1921) was \$250,000. There was also a provision for disposal of surplus.

**§§ 7472 (v)-7472 (y). Investments; interest; registration.**

(Repealed: Act 1925, c. 62, s. 17.)

ART. 14. NOTES FOR FUNDING PRISON DEBT

**§ 7472 (jj). Debt transferred to treasury.**

Inasmuch as the debit balance in the operating account of the State Prison, hereafter to be known as "The State Prison Department," has accumulated until it has now been ascertained that such debit balance is, as of January first, one thousand nine hundred twenty-five, two hundred and ninety-eight thousand eight hundred and forty-seven and forty-two one hundreds dollars and



since the operation of the said State Prison Department, from January first, one thousand nine hundred twenty-five to June thirtieth, one thousand nine hundred twenty-five, will further increase the said debit balance, the said total debit balance as finally ascertained, as of June thirtieth, one thousand nine hundred twenty-five, is hereby transferred to and declared to be a part of the debit balance of the State treasury, and that the same is a charge upon the general fund of the State; and since it is necessary to operate the State Prison Department out of the general fund of the State until July first, one thousand nine hundred twenty-five, the State Treasurer is vested with authority to pay for the operating of the State Prison Department until June thirtieth; one thousand nine hundred twenty-five, out of the general fund of the State, and the said State Treasurer shall have and use all authority and power which has been, or may be, at this session of the General Assembly, or hereafter, vested in the State Treasurer, to fund the debit balance of the treasury, by whatever name called, and such power and authority so to fund the same shall include full power and authority to fund the debit balance accruing in the State treasury, from the operation of the State Prison Department on June thirtieth, one thousand nine hundred twenty-five. All obligations issued to fund the same shall carry all the powers, privileges, exemptions and immunities as other obligations to fund the State debit balance. (1925, c. 132, s. 1.)

**§ 7472 (kk). Note issue authorized.**

Inasmuch as it appears necessary to purchase industrial machinery for use in the State Prison Department, from time to time, in such sum or sums as may be approved by the board of directors of the State Prison Department, not to exceed the sum of one hundred thousand dollars, and since it appears necessary to purchase fertilizer supplies for the farming operations of the State Prison Department, and that said purchase must be made and paid for prior to June thirtieth, one thousand nine hundred twenty-five, in such sums as may be approved by the board of directors of this department, not to exceed the sum of forty thousand dollars, the State Treasurer is hereby authorized and directed, by and with the consent of the Governor and Council of State, to borrow money, temporarily, or for such length of time as may be determined by the Governor and Council of State, not to exceed the sum of one hundred forty thousand dollars, for said purposes, and to agree to pay, and to pay, such rate or rates of interest at such times and places as may be fixed by the Governor and Council of State, and to execute and issue the notes of the State for same. (1925, c. 132, s. 2.)

**§ 7472 (ll). Faith of state pledged.**

The full faith, credit and taxing power of the State are hereby pledged for the payment of the principal and interest of the obligations herein authorized. (1925, c. 132, s. 3.)

**§ 7472 (mm). Obligations receivable for debts due state.**

The obligations hereby authorized, after maturity, shall be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State of any kind whatsoever. (1925, c. 132, s. 4.)

**§ 7472 (nn). Exemption from taxation; investment by fiduciaries.**

All of the obligations of the State issued pursuant to this article shall be exempt from all State, county and municipal taxation, or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue, or otherwise, and the interest on such obligations shall not be subject to taxation, as for income fund, nor shall said obligations be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation, and it shall be lawful for all executors, administrators, guardians and fiduciary generally, and all sinking fund commissions, to invest any money in their hands in said obligations. (1925, c. 132, s. 5.)

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**CHAPTER 126****STATE DEPARTMENTS, INSTITUTIONS, AND COMMISSIONS****ART. 1. STATE BUDGET COMMISSION****§§ 7473-7486 (i). Budget provisions.**

(Repealed: Act 1925, c. 89, s. 21.)

**ART. 1(A). EXECUTIVE BUDGET ACT****§ 7486 (j). Definitions.**

This act shall be known, and may be cited as "The Executive Budget Act." Whenever the word "Director" is used herein, it shall be construed to mean "Director of the Budget." Whenever the word "Commission" is used herein, it shall be construed to mean the "Advisory Budget Commission." (1925, c. 89, s. 1.)

**§ 7486 (k). Purpose of the act; governor director of budget; assistant.**

It is the purpose of this act to vest in the Governor of the State a more direct and effective supervision of all agencies and institutions of the State; for the efficient and economical administration of all such agencies and institutions; and for the initiation and preparation for each session of the General Assembly of a balanced budget of State revenues and expenditures. To this end the Governor shall be ex officio the Director of the Budget, and shall be the head of the



Budget Bureau which is hereby created and established in connection with his office. He shall, upon ratification of this act, appoint a budget officer to be known as the Assistant to the Director, who shall serve at his pleasure until the first day of July, one thousand nine hundred and twenty-five, and thereafter for a term of four (4) years, beginning on the first day of July next after the inauguration of the Governor. (1925, c. 89, s. 2.)

### **§ 7486 (1). Power of director.**

The Director shall have power to examine under oath any officer or head of any department or any institution, or any clerk or employee thereof; to cause the attendance of heads or responsible representatives of the departments, institutions and agencies of the State to furnish information; to compel the production of papers, books and accounts or other documents in the possession or under the control of such officer or head of department, and the Director, or any authorized representative, shall have the right to examine any State institution or agency, inspect its property and inquire into its methods of operation and management.

The Director shall also have power, if in his judgment it appears necessary, to have the books and accounts of any of the departments or institutions audited: to supervise generally the accounting and auditing systems now in force and to inaugurate such changes in respect thereto as may be necessary to exhibit correct information covering the financial condition, including the budget accounts of said departments, institutions and other agencies. The costs of making all audits and effecting necessary changes in the system of accounting shall be paid from the regular maintenance appropriations made by the General Assembly for the departments, institutions or other agencies involved.

It shall be the duty of the Director to recommend to the General Assembly at each biennial session, such changes in the organization, management and general conduct of the various departments, institutions and other agencies of the State as in his judgment will promote the more efficient and economical operation and management thereof. (1925, c. 89, s. 3.)

### **§ 7486 (m). Advisory commission; compensation; meetings.**

The chairman of the appropriation and the finance committees of the House and of the Senate, and two other persons to be appointed by the Governor shall constitute an Advisory Budget Commission, whose duties shall be such as hereinafter defined. The members of the Advisory Budget Commission shall receive as full compensation for their services, ten dollars (\$10) per day for each day which they shall serve, and their expenses. The Advisory Budget Commission shall be called in conference in January and July of each year, upon ten days notice by the Director, as well as for the biennial

consideration of the budget, and at such other times as in the opinion of the Director may be in the public interest. (1925, c. 89, s. 4.)

**§ 7486 (n). Appropriations.**

All money shall be appropriated in the manner set forth in this act; and no money shall be disbursed from the State Treasury except as herein provided. (1925, c. 89, s. 5.)

**§ 7486 (o). Departments, etc., to furnish information biennially.**

On or before the first day of September, biennially, in the even-numbered years, each of the departments, bureaus, divisions, officers, boards, commissions, institutions and other State agencies and undertakings, receiving or asking financial aid from the State, or receiving or collecting funds under authority of any general law of the State, shall furnish the Director all the information, data and estimates which he may request with reference to past, current and future appropriations, expenditures, receipts, revenue and income. (1925, c. 89, s. 6.)

**§ 7486 (p). Itemized statements required.**

The statements and estimates required under the preceding section shall be itemized in accordance with the budget classification adopted by the Director and shall be approved and certified by the respective heads or a responsible officer of each department or State agency submitting the same. The official estimate blanks used in making these reports shall be furnished by the Budget Bureau. (1925, c. 89, s. 7.)

**§ 7486 (q). Statement of auditor.**

On or before the first day of September, biennially, in the even-numbered years, the State Auditor shall furnish the Director a detailed statement of the expenditures of the General Assembly for the current fiscal biennium and an estimate of its financial needs, itemized in accordance with the budget classification adopted by the Director and approved and certified by the presiding officer of each house, for each year of the ensuing biennial period beginning with the first day of July thereafter; and a detailed statement of the expenditures of the judiciary and any other department, agency, institution or commission that may be requested by the Director for each year of the current fiscal biennium and an estimate of its financial needs as provided by law, itemized in accordance with the budget classification adopted by the Director for each year of the ensuing biennial period beginning with the first day of July thereafter.

The State Auditor shall transmit to the Director with these estimates an explanation of all increases or decreases. These estimates and accompanying explanation shall be included in the budget, without revision, by the Director. (1925, c. 89, s. 8.)



**§ 7486 (r). Contents of statement.**

On or before the first day of September, biennially in the even-numbered years, the State Auditor shall furnish the Director the following statements itemized in accordance with the budget classification adopted by the Director.

(1) A statement showing the balance standing to the credit of the several appropriations for each department, bureau, division, officer, board, commission, institution, or other State agency or undertaking of the State at the end of the last preceding appropriation year;

(2) A statement showing the quarterly expenditures and revenues from each appropriation account, and the total quarterly expenditures and revenues from all the appropriation accounts, including special and all other appropriations, in the twelve months of the last preceding appropriation year;

(3) A statement showing the annual expenditures in each appropriation account, and the revenue from all sources for each year of the last two appropriation years, with the increase or decrease for each source;

(4) An itemized and complete financial balance sheet for the State at the close of the last preceding fiscal year ending June thirtieth;

(5) Such other statements as the Director shall request. (1925, c. 89, s. 9.)

**§ 7486 (s). Special information furnished on request.**

The departments, bureaus, divisions, officers, boards, commissions, institutions, or other State agencies or undertakings of the State, upon request, shall furnish the Director, in such form and at such time as he may direct, any information desired by him in relation to their respective activities or fiscal affairs. The State Auditor shall also furnish the Director any special, periodic or other financial statements as he may direct. (1925, c. 89, s. 10.)

**§ 7486 (t). Public hearings on budget questions.**

The members of the Commission shall, at the request of the Director, attend such public hearings and other meetings as may be held in the preparation of the budget. Said Commission shall act at all times in an advisory capacity to the Director on matters relating to the plan of proposed expenditures of the State government and the means of financing the same.

The Director, together with the Commission, shall provide for public hearings on any and all estimates to be included in the budget, which shall be held during the month of November biennially in the even-numbered years, and may require the attendance at these hearings of the heads or responsible representatives of all State departments, bureaus, divisions, officers, boards, commissions, institutions, or other State agencies or undertakings. (1925, c. 89, s. 11.)

**§ 7486 (u). Survey of departments; budget report.**

On or before the fifteenth day of December, biennially in the even-numbered years, the Director shall have completed a careful survey of the operation and management of all the departments, bureaus, divisions, officers, boards, commissions, institutions, and other State agencies and undertakings of the State, in the interest of economy and efficiency, and a working knowledge upon which to base recommendations to the General Assembly of appropriations for maintenance and for capital expenditures for the succeeding biennium. If the Director and the Commission shall agree in their recommendations for the budget for the next biennial period, they shall prepare their report in the form of a proposed budget, together with such comment and recommendations as they find proper to make. If the Director and the Commission shall not agree in substantial particulars, the Director shall prepare the proposed budget, based on his own conclusions and judgment, and shall cause to be incorporated in it such statement of disagreement, and the particulars thereof, as the Commission, or any of its members, shall find proper to submit as representing their own views. The budget report shall contain a complete and itemized plan of all proposed expenditures for each State department, bureau, division, officer, board, commission, institution, or other State agency or undertaking, in accordance with the classification adopted by the Director, and of estimated revenues and borrowings, for each year in the ensuing biennial period beginning with the first day of July thereafter. Opposite each item of the proposed expenditures the budget shall show in separate parallel columns the amount appropriated and expended for the last preceding appropriation year, for the current appropriation year, and the increase or decrease. The budget shall clearly differentiate between proposed general fund expenditures for operating and proposed capital outlays.

The Director shall accompany the budget with:

(1) A budget message supporting his recommendations and outlining a financial policy and program for the ensuing biennial period. The message will include an explanation of increase or decrease over past expenditures, a discussion of proposed changes in existing revenue laws and proposed bond issues, their purpose, the amount, rate of interest, term, the requirements to be attached to their issuance and the effect such issues will have upon the redemption and annual interest charges of the State debt.

(2) An itemized and complete financial statement for the State at the close of the last preceding fiscal year ending June thirtieth.

(3) A statement of special funds.

(4) A statement showing the itemized estimates of the condition of the State Treasury as of the beginning and end of each of the next two appropriation years. (1925, c. 89, s. 12.)



**§ 7486 (v). Preparation of appropriation and revenue bills.**

The Director, by and with the advice of the Commission, shall also cause to be prepared a bill containing all proposed appropriations of the budget for each year in the ensuing biennial appropriation period, which shall be known as "The Budget Appropriation Bill." The Director and the Commission shall prepare a revenue bill, to be known as "The Budget Revenue Bill," which will in their judgment and estimation provide an amount of revenue for the ensuing biennial period sufficient to meet the appropriations proposed in the Budget Revenue Bill. To the end that all expenses of the State may be brought within the budget, the Budget Appropriation Bill shall also contain a specific sum as a contingent or emergency appropriation. The manner of the allocation of such contingent or emergency appropriation is as follows: Any institution, department, commission, or other agency or activity of the State desiring an allotment out of such contingent or emergency appropriation, shall upon forms prescribed and furnished by him, present such request in writing to the Director of the Budget, with such information as he may require, and if the Director of the Budget shall approve such request in whole or in part, he shall forthwith present the same to the Governor and Council of State, and upon their order only shall such allotment be made or refused. If the Director shall disapprove the request for an allotment for such an appropriation, he shall transmit his refusal and his reasons therefor to the Governor and Council of State for their information.

If the Director and the Commission shall not agree as to the appropriation and revenue bills in substantial particulars, the Director shall prepare the same, based on his conclusions and judgment, and shall cause to be submitted therewith such statements of disagreement, and the particulars thereof, as the Commission, or any of its members, shall find proper to submit as representing their own views. (1925, c. 89, s. 13.)

**§ 7486 (w). Copies of report printed; bills introduced.**

The Director shall cause to be printed one thousand copies of the budget report and the appropriation and revenue bills and the Governor shall present copies thereof to the General Assembly, together with his biennial message. The appropriation bill shall be introduced by the Chairman of the Committee on Appropriations in each house, and the revenue bill shall be introduced by the Chairman of the Finance Committee in each house: *Provided*, that for the years in which a Governor is elected, the Director shall deliver the budget report and the appropriation and revenue bills to the Governor-elect, on or before the fifteenth day of December, and the said budget report, appropriation and revenue bills shall be presented by the Governor to the General Assembly with such recommendations in the way of amendments or other modifications as he may determine. (1925, c. 89, s. 14.)

**§ 7486 (x). Joint meetings of appropriations committees.**

The Appropriations Committee of the House of Representatives and of the Senate, or subcommittees thereof, shall sit jointly in open sessions while considering the budget and such consideration shall embrace the entire budget plan, including appropriations for all purposes, revenues, borrowings and other means for financing expenditures. Such joint meetings shall begin within five days after the budget has been submitted to the General Assembly by the Governor. This joint committee shall have power to examine under oath any officer or head of any department or any clerk or employee thereof; and to compel the production of papers, books of accounts and other documents in the possession or under the control of such officer or head of department. It may cause the attendance of heads or responsible representatives of the departments, institutions and all other agencies of the State to furnish such information and answer such questions as the joint committee shall require, and to these sessions shall be admitted, with the right to be heard, all taxpayers or other persons interested in the estimates under consideration. The Director, or his designated representatives, shall have the right to sit at these public hearings and be heard on all matters coming before the joint committee. (1925, c. 89, s. 15.)

**§ 7486 (y). Reduction and increase of appropriations.**

The provisions set forth in this section are to be the legislative policy with reference to making appropriations. The General Assembly may reduce or strike out such items in the budget bill as it may deem to be in the interest of the public service, but neither house shall consider further or special appropriations, until the budget bill shall have been enacted, unless the Governor shall submit and recommend the passage of an emergency appropriation bill or bills which may be amended in the above manner, and which shall continue in force only until the budget bill shall become effective.

The General Assembly may also increase any appropriation proposed in the appropriation bill, or provide additional appropriations for other purposes, if additional revenue equal to the amount of such additional appropriations is provided for by corresponding amendment to the revenue bill. No bill carrying an appropriation shall thereafter be passed by the General Assembly, unless it be for a single object therein described and shall provide an adequate source of revenue for defraying such appropriation, or unless it appears from the budget that there is sufficient revenue available therefor, the appropriation in such bills shall be in accordance with the classification used in the budget. (1925, c. 89, s. 16.)

**§ 7486 (z). All appropriations made under this act.**

Every State department, bureau, division, officer, board, commission, institution and other State agencies or undertakings shall operate under an appropriation made in accordance with the provi-



sions of this act; and no State department, bureau, division, officer, board, commission, institution, or other State agency shall expend any money except in pursuance to such an appropriation. (1925, c. 89, s. 17.)

#### **§ 7486 (aa). Allotment of appropriations on requisition.**

Before an appropriation to any spending agency shall become available, such agency shall submit to the Director, not less than twenty (20) days before the beginning of each quarter beginning July first, one thousand nine hundred and twenty-five, and each quarter thereafter a requisition for an allotment of the amount estimated to be required to carry on the work of the agency during the ensuing quarter and such requisition to contain such details of proposed expenditures as may be required by the Director. The Director shall approve such allotments, or modifications of them, as he may deem necessary to make, and he shall submit the same to the State Auditor who shall be governed in his control of expenditures by said allotments. No allotment shall be changed nor shall transfers be made except upon the written request of the responsible head of the spending agency and by approval of the Director in writing. Before such changes or transfers shall become effective, a copy of the request and approval must be transmitted to the State Auditor. (1925, c. 89, s. 18.)

#### **§ 7486 (bb). Expenditure of appropriations.**

No department, bureau, division, officer, board, commission, institution, or other State agency receiving an appropriation covering the biennial period shall expend more than one-half of such appropriation during the first year of the biennial period, and all unexpended appropriations shall revert to the State Treasury to the credit of the general fund at the close of the biennial fiscal period; except that capital appropriations for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made. The reversion of unexpended balances of appropriations provided for in this section shall not take effect prior to the beginning of the next fiscal year after the ratification of this act, and shall not apply to appropriations heretofore made by the General Assembly and paid out by the State Treasurer. (1925, c. 89, s. 19.)

#### **§ 7486 (cc). Assistance for director.**

The Director is hereby authorized to secure such special help, expert accountants, draftmen and clerical help as he may deem necessary to carry out his duties under this act; and shall fix the compensation of all persons employed under this act; which shall be paid by the State Treasurer upon the warrant of the State Auditor. A statement in detail of all persons employed, time employed, compensation paid, and itemized statement of all other expenditures made under

the terms of this act, shall be reported to the General Assembly by the Director, and all payments made under this act shall be charged against and paid out of the emergency contingent fund when such fund is provided in the general appropriation bill. (1925, c. 89, s. 20.)

**§ 7486 (dd). Examination of accounts of treasurer and auditor.**

The Director shall examine or cause to be examined annually before the close of the fiscal year, the accounts of the State Treasurer and the Auditor and shall examine or cause to be examined, the accounts and vouchers relating to all money received into and paid out of the treasury during the preceding fiscal year, and shall cause a complete audit to be made annually of the condition of the State Treasury and shall certify and report to the Budget Bureau such audits and the Budget Bureau through the Governor, shall transmit such reports to the General Assembly at its next session. (1925, c. 89, s. 22.)

**§ 7486 (ee). Power to administer oaths.**

The Director, the assistant to the Director, and any member of the Advisory Budget Commission shall have full authority to administer oaths to any person for any purpose in connection with the performance of the duties of the said commissions, and such oath, when taken before said persons, shall be sufficient in all respects to support an indictment for perjury when the other elements of said crime exist. (1925, c. 89, s. 24.)

**§ 7486 (ff). Issuance of subpoenas.**

The Director shall have and is hereby given full power and authority to issue the writ of subpoena for any and all persons who may be desired as witnesses concerning any matters being inquired into by the Director or the Commission, and such writs when signed by the Director shall run anywhere in this State and be served by any civil process officer without fees or compensation therefor. Any failure to serve writs promptly and with due diligence, shall subject such officer to the usual penalties and liabilities and punishment as are now provided in the cases of like kind applying to sheriffs, and any persons who shall fail to obey said writ shall be subject to punishment for contempt in the discretion of the court and to be fined as witnesses summoned to attend the Superior Court, and such remedies shall be enforced against such offending witness upon motion and notice filed in the Superior Court of Wake County by the Attorney-General under the direction of the Director. Any and all persons who shall be subpoenaed and required to appear before the Director or the commission as witnesses concerning any matters being inquired into shall be compellable and required to testify, but such persons shall be immune from prosecution and shall be forever pardoned for violation of law about which such person is so required to testify. (1925, c. 89, s. 26.)



**§ 7486 (gg). Surveys, studies and examinations of departments and institutions.**

The Director is hereby given full power and authority to make such surveys, studies, examinations of departments, institutions and agencies of this State, as well as its problems, so as to determine whether there may be an overlapping in the performance of the duties of the several departments and institutions and agencies of the State, and for the purposes of determining whether the proper system of modern accounting is had in such departments, institutions, commissions and agencies and to require and direct the installation of the same whenever, in his opinion, it is necessary and proper in order to acquire and to secure a perfect correlated and control system in the accounting of all departments, institutions, commissions, divisions, and State agencies, including every department or agency handling or expending State funds, and to make surveys, examinations and inquiries into the matters of the various activities of the State, and to survey, appraise, examine and inspect, and determine the true condition of all property of the State, and what may be necessary to protect it against fire hazard, deterioration, and to conserve its use for State purposes. (1925, c. 89, s. 26.)

**§ 7486 (hh). Request for appropriations for budget bureau.**

The Budget Bureau shall make to the Director its request for appropriations for the biennium beginning June thirtieth, nineteen hundred and twenty-seven, and for each succeeding biennium thereafter, and the appropriations for the Budget Bureau shall be included in the emergency or contingent appropriation. (1925, c. 89, s. 27.)

**§ 7486 (ii). Act inapplicable to highways.**

Nothing in this act shall be held or construed to apply to the State highway. (1925, c. 89, s. 28.)

**§ 7486 (jj). Delegation of power by director.**

Any power or duty herein conferred on the Governor as Director may be exercised and performed by such person or persons as may be designated from time to time in writing by the Director. (1925, c. 89, s. 29.)

ART. 1. (B). BUDGET OF STATE INSTITUTIONS

**§ 7486 (kk). Budget of requirements.**

The several institutions of the State to which appropriations are made for either permanent improvements or for maintenance shall, before any of such appropriations, whether for permanent improvements or for maintenance are available and paid to them or any one of them, budget their requirements and present the same to the Director of the Budget on or before the first day of June, one thousand

nine hundred and twenty-five and each biennium thereafter. There shall be a separate budget presented for permanent improvements and for maintenance. Each of said budgets shall contain the requirements of said institutions for the succeeding two years. In the preparation of such budget, each institution shall follow as nearly as may be, the itemized requests which were submitted by such institution to the Budget Commission, the Advisory Budget Commission or the Director of the Budget immediately prior to the passage of the act of the General Assembly making such appropriation and upon which the appropriation was calculated and made. The forms, except when modified and changed by order of the Director of the Budget, shall be the forms used in presenting the requests. (1925, c. 230, s. 2.)

**§ 7486 (11). Money expended only for purposes expressed.**

All buildings and other permanent improvements, which shall be erected, constructed, shall be erected, constructed and carried on and the money spent therefor in strict accordance with the budget requests of such institution filed with the Director of the Budget. The expenditure of appropriations for maintenance shall be in strict accordance with the budget requests of such institution. It shall be the duty of the Director of the Budget to see that all money appropriated for either permanent improvements or maintenance shall be expended in strict accordance with the budget of each institution, and the appropriation made by the General Assembly for such purpose. If the Director of the Budget shall ascertain that any institution has used any of the moneys appropriated to it for any purpose other than that for which it was appropriated and budgeted, as herein required, and in strict accordance with the terms of this article, the Director of the Budget shall have the power and he is hereby authorized to notify such institution that no further sums from any appropriation made to it will be available to such institution until and after the persons responsible for the diversion of the said funds shall have made the same good, and the Director of the Budget shall have the power and he is hereby authorized to notify the Auditor of the State not to issue any further warrants to such institution for any unexpected appropriation and the Auditor is hereby prohibited from issuing any further warrants until he shall have been otherwise directed by the Director of the Budget. (1925, c. 230, s. 3.)

**§ 7486 (mm). Liability for wrongful expenditure.**

Any trustee, director, manager, building committee or other officer or person connected with any institution to which an appropriation is made, who shall expend any appropriation for any purpose other than that for which the money was appropriated and budgeted or who shall consent thereto, shall be liable to the State of North Carolina for such sum so spent and the sum so spent, together with interest and costs, shall be recoverable in an action to be instituted by



the Attorney-General for the use of the State of North Carolina, which action may be instituted in the Superior Court of Wake County. (1925, c. 230, s. 4.)

**§ 7486 (nn). Purpose of article.**

It is the intent and purpose of this article that all institutions to which appropriations for permanent improvements and maintenance are made, shall submit to the Director of the Budget their requests for the payment of such appropriations in the form of a budget, following the requests made by such institution for such appropriation, to the end that the Director of the Budget may be advised as to whether or not the moneys are being used for purposes other than that for which it was appropriated. (1925, c. 230, s. 5.)

**§ 7486 (oo). Wrongful expenditure; procedure.**

If any appropriation or any part thereof is used or expended for any purpose other than the purpose specified in the act making such appropriation, then, at the request of the Director of the Budget, a suit shall be instituted in the name of the State by the Attorney-General in Wake County for the purpose of recovering from each superintendent, director or trustee who voted for such diversion or aided and abetted in the same, the amount so diverted, with six per cent (6 per cent) interest thereon from the date of such diversion, together with the costs of such action and all expenses and costs incurred by the State in prosecuting such action, including any attorneys' fees, to be fixed by the judge trying the action, and the Director of the Budget is authorized to notify the State Auditor and the State Treasurer not to issue any warrant for or to pay any warrant for the expenditure of the unexpended balance of such appropriation until the replacement of the funds so diverted, together with interest and costs and allowances as above provided, and upon the complete replacement of the same, such notice shall be given to the Auditor and State Treasurer of such replacement, to the end that the use of such appropriation may be resumed, as set out in the appropriating act, and in such cases the statute or statutes causing the lapse of unexpended balances, the appropriation for maintenance shall be suspended in the meantime as to any appropriation made to such institution or institutions. (1925, c. 275, s. 7.)

ART. 2. STATE BUILDING COMMISSION

**§ 7489 (a). Separate specifications for building contracts.**

Every officer, board, department, commission or commissions charged with the duty of preparing specifications or awarding or entering into contract for the erection, construction or altering of buildings for the State, when the entire cost of such work shall exceed ten thousand dollars, must have prepared separate specifications for each of the following branches of work to be performed: 1. Heating and

ventilating. 2. Plumbing and gas fitting. All such specifications must be so drawn as to permit separate and independent bidding upon each of the classes of work enumerated in the above subdivisions. All contracts hereafter awarded by the State or a department, board, commissioner, or officer thereof, for the erection, construction or alteration of buildings, or any part thereof, shall award the respective work specified in the above subdivisions separately to responsible and reliable persons, firms or corporations regularly engaged in their respective line of work. (1925, c. 141, s. 2.)

ART. 5. (B). TRANSPORTATION ADVISORY COMMISSION

**§ 7516 (e). Commission created.**

An advisory commission is hereby created to be known as the Transportation Advisory Commission. The commission shall consist of twelve (12) citizens of the State of North Carolina, whose experience and knowledge as business men and shippers are such as to enable them to give intelligent consideration to the problems assigned them by this article for investigation. The members of the commission shall be appointed by the Governor, who shall also appoint the chairman and vice chairman of the commission, and shall fill any vacancies that may occur in the membership of the commission. (1925, c. 266, s. 2.)

**§ 7516 (f). Organization meeting.**

It shall be the duty of the chairman to call the commission into session at an early time and at a place to be designated by him, at which session the commission shall organize and adopt rules for its administration and the conduct of its proceedings. The commission shall elect a secretary, and is authorized to employ clerks, assistants, competent counsel and experts. (1925, c. 266, s. 3.)

**§ 7516 (g). Compensation; expenses.**

The members of the commission shall be allowed the same per diem as members of the General Assembly for such time as actually engaged in the performance of their duties under this act and actual traveling expenses. The chairman and secretary of the commission may be allowed such special compensation as may be approved by the Governor and Council of State. Upon recommendation of the commission, an allotment of funds shall be made from time to time by the director of the budget, from the contingent fund in the general appropriation bill, to meet the necessary expenses incurred under this article, which necessary expenses shall not exceed twenty-five thousand dollars (\$25,000) in the biennial period following March 10, 1925. Such necessary expenses shall be paid by the State Treasurer upon warrant of the State Auditor, to be issued upon the filing with the Auditor of a statement of such expenses, sworn to by



the member or members incurring the same, or upon requisition by the chairman and secretary for necessary expenses other than that of members of the commission. (1925, c. 266, s. 4.)

**§ 7516 (h). Duties of commission.**

It shall be the duty of the commission to make a complete and thorough survey of the entire structure of freight rates to, from and within North Carolina to ascertain if there is discrimination against receivers and shippers of freight in this State in any of such schedules of freight rates, the probable causes thereof, together with the recommendations as to the action which, in the judgment of the commission, will afford a remedy for any such discrimination found to exist; and in particular what action, if any, the State can safely and properly take in coöperation with the Federal government or otherwise, to aid in the development of water transportation to and from North Carolina ports. (1925, c. 266, s. 5.)

**§ 7516 (i). Commission to take testimony.**

It shall be the duty of the commission, or of a committee appointed by it, to take testimony of any interested parties, upon any or all phases of the subject-matter assigned to them by this article for investigation, or which may have a bearing upon the questions which they are directed to investigate. (1925, c. 266, s. 6.)

**§ 7516 (j). Hearings; production of books and papers.**

The commission may hold hearings at such times and places in this State as it may find convenient, and may designate one or more members to take testimony outside the borders of the State, and within the State of North Carolina may compel the production of books and papers by the same process and proceedings authorized by law to compel the production of books and papers in the Superior Court. (1925, c. 266, s. 7.)

**§ 7516 (k). Report to governor; proceedings before interstate commission and shipping board.**

The commission shall from time to time make report to the Governor, setting forth the facts ascertained and conclusions reached from its investigations, including recommendations as to any course to be taken either by the institution of proceedings before the Interstate Commerce Commission, the Shipping Board or in the courts in respect to freight rates, or recommendations for legislative measures which in their judgment should be enacted by the General Assembly. If any recommendation for institution of proceedings as aforesaid shall be approved by the Governor, it shall be the duty of the Corporation Commission to institute and prosecute, by and with the advice of the Transportation Advisory Commission, such acts and proceedings as may be so recommended and approved. (1925, c. 266, s. 8.)

**§ 7516 (1). Recommendations involving expenditures.**

No recommendations that involve expenditures not authorized by this article shall become effective unless such recommendation is adopted by, and an appropriation for such purpose made by the General Assembly, but it shall be the duty of the Governor to lay before the General Assembly any recommendation of the commission for further legislative action, and to indicate at the same time his own opinions concerning such recommendations. (1925, c. 266, s. 9.)

**ART. 8. INMATES OF STATE INSTITUTIONS TO PAY COSTS****§ 7534 (d). Institutions included.**

All persons admitted to the State Hospital at Raleigh, State Hospital at Morganton, State Hospital at Goldsboro, Caswell Training School at Kinston, Stonewall Jackson Training School for Boys at Concord, the State Home and Industrial School for Girls at Samarcand, the East Carolina Training School at Rocky Mount, the Morrison Training School for Negro Boys in Richmond County, the School for the Deaf at Morganton, the School for the Blind and Deaf at Raleigh, and the North Carolina Sanatorium for the Treatment of Tuberculosis at Sanatorium, be and they are hereby required to pay the actual cost of their care, treatment, training and maintenance at such institutions. (1925, c. 120, s. 1.)

**§ 7534 (e). Governing board to fix cost.**

The respective boards of trustees or directors of each of said institutions, by whatever name they may be called, are hereby empowered with the final authority to determine and fix the actual cost of such training, treatment, care and maintenance, to be paid for by or for each inmate or patient, and the said boards of trustees or directors shall, to the best of their ability, fix such cost so as to include all the cost of such care, maintenance, treatment and training at such institutions, for each respective inmate, pupil or patient thereof, and the said sum, when so fixed, shall be the actual cost thereof. (1925, c. 120, s. 2.)

**§ 7534 (f). Payments.**

Such cost, when so fixed and determined by the respective boards of trustees or directors of each institution, shall be paid by the patient, pupil or inmate thereof, or by his parent, guardian, trustee or other person legally responsible therefor, and the payment thereof shall constitute a valid expenditure of the funds of any such pupil, patient or inmate by any fiduciary who may be in the control of such fund, and a receipt for the payment of such cost in the hands of such fiduciary shall be a valid voucher to the extent thereof in the settlement of his accounts of his trust. Immediately upon the determination of the cost, as herein provided for, the superintendent of the institution shall notify the patient, pupil, inmate, parent, guardian,



trustee, or such other person who shall be legally responsible for the payment thereof, of the monthly amount thereof, and such statement shall be rendered from month to month. The respective boards of trustees or directors of the various institutions are vested with full and complete authority to arrange with the patient, pupil, inmate, parent, guardian, trustee, or other person legally responsible for the cost, for the payment of any portion of such cost monthly or otherwise, in the event such patient, pupil, inmate, parent, guardian, trustee or other person legally responsible therefor shall not be able to pay the total cost. The head of the various institutions shall annually file with the Auditor of the State a list of all unpaid accounts. (1925, c. 120, s. 3.)

#### **§ 7534 (g). Determining who is able to pay.**

From and after March 4, 1925, the respective boards of trustees or directors of each institution shall ascertain which of the various patients, pupils or inmates thereof, or which of the parents, guardians, trustees, or other persons legally responsible therefor, are financially able to pay the cost, to be fixed and determined by this article, and so soon as it shall be ascertained such patient, pupil, inmate, parent, guardian, trustee or other person legally responsible therefor, shall be notified of such cost, and in general of the provisions of this article and such patient, pupil, inmate or the parent, guardian, trustee, or other person legally responsible therefor, shall have the option to pay the same or to remove the patient, pupil or inmate from such institution, unless such person was committed by an order of a court of competent jurisdiction, in which event, the liability for the cost as fixed by this article shall be fixed or determined and payment shall be made in accordance with the terms of this article. (1925, c. 120, s. 4.)

#### **§ 7534 (h). Action to recover costs.**

Immediately upon the fixing of the amount of such actual cost, as herein provided, a cause of action shall accrue therefor in favor of the State for the use of the institution in which such patient, pupil or inmate is receiving training, treatment, maintenance or care, and the State for the use of such institution may sue upon such cause of action in the courts of Wake County, or in the courts of the county in which such institution is located, against said patient, pupil or inmate, or his parents, or either of them, or guardian, trustee, committee, or other person legally responsible therefor, or in whose possession and control there may be any funds or property belonging to either the said pupil, patient or inmate, or to any person upon whom the said patient, pupil or inmate may be legally dependent, including both parents. (1925, c. 120, s. 5.)

#### **§ 7534 (i). No limitation of such action.**

No statute of limitation shall apply to or constitute a defense to any cause of action asserted by any of the above-named institutions

for the collection of the cost of care, treatment, training or maintenance, or any or all of these against any person liable therefor, as herein provided, and all statutes containing limitations which might apply to the same are hereby *pro tanto* repealed, as to all such causes of action or claims, and this section shall apply to all claims and causes of action for like cost heretofore incurred with such institutions and now remaining unpaid. (1925, c. 120, s. 6.)

**§ 7534 (j). Power of trustees to admit indigent persons.**

This article shall not be held or construed to interfere with or to limit the authority and power of the management of the boards of trustees, or directors of any of the institutions named herein, to make provision for the care, custody, treatment and maintenance of all indigent persons who may be otherwise entitled to admission in any of the said institutions, and as to indigent pupils, inmates, and patients, the same provisions now contained in the several statutes relating thereto shall continue in force, but if at any time any of the said indigent patients, pupils or inmates shall succeed to or inherit, or acquire, in any manner, property, or any of the persons named above as legally responsible for the cost of care, treatment and maintenance of the pupil, inmate and patient at the above named institutions, shall acquire property, or shall otherwise be reputed to be solvent, then each of said institutions shall have the full right and authority to collect and sue for the entire cost and maintenance of such inmate, pupil or patient, without let or hindrance on account of any statute of limitation whatsoever. (1925, c. 120, s. 7.)

**§ 7534 (k). Suit by attorney general; venue.**

At the request of such institution, all actions and suits shall be sued upon and prosecuted by the Attorney General, and such institution shall have the right to elect as to whether it will institute such action in the courts of Wake County or in the courts of the county in which such institution is located. (1925, c. 120, s. 8.)

**§ 7534 (l). Judgment; never barred.**

Any judgment obtained by the State for the use of any of the above named institutions shall never be barred by any statute of limitation, but shall continue in force, and, at the request of the Attorney-General or the superintendent of any of said institutions, an execution shall issue therefor at any time without requiring such institution to revive the said judgment, as is now provided by statute, but in case any judgment debtor, or any fiduciary responsible for the payment thereof, shall make affidavit and file the same with the clerk of the Superior Court from which such execution is issued, that payments have been made upon the said judgments, then the clerk shall recall said execution and proceed to hear and determine what is the true amount due thereon, if anything, in the same manner as is now required in motions to revive dormant judgments with



the right of appeal to the judge of the Superior Court, as now provided in such motions, and the clerk of the Superior Court and the judge thereof shall have authority, in their discretion, to require security for the payment of the amount of said judgment pending such appeal. (1925, c. 120, s. 9.)

**§ 7534 (m). Death of inmate; lien on estate.**

In the event of the death of any inmate, pupil or patient, of either of said institutions above named, leaving any such cost of care, maintenance, training and treatment unpaid, in whole or in part, then such unpaid cost shall constitute a first lien on all the property, both real and personal, of the said decedent, subject only to the payment of funeral expenses and taxes to the State of North Carolina. (1925, c. 120, s. 10.)

**§ 7534 (n). Money paid into state treasury.**

All money collected by any institution pursuant to this article shall be by such institution paid into the State treasury, and shall be by the State Treasurer credited to the account of the institution collecting and turning the same into the treasury, and shall be paid out by warrants drawn by the Auditor as in cases of appropriations made for the maintenance of such institutions and shall be used by such institution as it uses and is authorized by law to use appropriations made for maintenance. (1925, c. 120, s. 11.)

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CHAPTER 128

**STATE LANDS**

**Subchapter I. Entries and Grants**

ART. 1. LANDS SUBJECT TO GRANT

**§ 7545. Void grants; not color of title.**

Applied in *Ga.-Car. Land, etc., Co. v. Potter*, 189 N. C. 56, 127 S. E. 343.

ART. 3. ENTRIES

**§ 7554. Who entitled to make entries.**

**Disputed Ownership.**—The plaintiff claimed the locus in quo under the provisions of this section as vacant and unappropriated, and defendant filed his protest under those of C. S., 7557, the question of ownership depending upon the location of the land within the boundaries of the senior grant. Upon an agreed case the trial judge found the facts. It was held that the boundaries of the grant were matters of law, and where the boundaries were, those of fact, and the findings of fact by the court, under the terms of the agreement, when supported by evidence, are conclusive on appeal. *Brooks v. Woodruff*, 185 N. C. 288, 116 S. E. 724.

The protestants, under the provisions of section 7557, claimed the origi-

nal entry was not under this section for the State's vacant and unappropriated lands, but that they were the owners of the entire tract. After the evidence had been introduced, the protestant disclaimed ownership of half of the locus in quo. There was no reversible error in the judgment in protestant's favor. *Nelson v. Lineker*, 172 N. C. 279); but it was held, that the enterer was entitled to judgment declaring the remainder of the lands covered by the entry to be vacant and unappropriated, and for costs. *In re Hurley*, 185 N. C. 422, 117 S. E. 345.

### § 7557. Protest filed; bonds required.

See notes to § 7554.

## ART. 5. GRANTS

### § 7584 (a). Grant of Moore's Creek battlefield authorized.

That in the event that Congress passes the bill now pending in Congress introduced by Congressman C. L. Abernethy authorizing the United States Government to take title to Moore's Creek Battlefield, Pender County, preserving the same as an historic battlefield, the Governor of the State of North Carolina is hereby authorized to execute to the United States Government a deed vesting the title in said United States Government on behalf of the State of North Carolina: *Provided*, that the consent of the State of North Carolina to such acquisition by the United States is upon the express condition that the State of North Carolina shall so far retain a concurrent jurisdiction with the United States over such battlefield as that all civil and criminal processes issued from the courts of the State of North Carolina may be executed thereon in like manner as if this authority had not been given and that the State of North Carolina also reserves authority to punish all violations of its criminal laws committed on said tract of land so ceded: *Provided further*, that the title to said battlefield so conveyed to the United States shall revert to the State of North Carolina unless said land is used for the purpose for which it is ceded. (1925, c. 40.)

## ART. 6. CORRECTION OF GRANTS

### § 7590. Errors in grants corrected.

**Fraud or Mistake.**—If a grant is issued by fraud or mistake it is not a clerical error within the purview of this section. *Herbert v. Development Co.*, 179 N. C. 662, 664, 103 S. E. 380.

**Same—Change of Name in Grant.**—The power conferred upon the Secretary of State by ch. 460, Laws of 1889, now this section, to correct errors in grants of State's land, by supplying omissions, or correcting the names of grantees, material words or figures, etc., confers on him only a ministerial authority and not a judicial power, which is vested in the courts by our constitution, art. 4, sec. 2; and his change of the name in the grant from one person to another, by name, is in effect to declare the former a trustee of the latter, or his heirs at law, under a grant obtained by fraud or mistake, etc., and within the exclusive jurisdiction of the courts, and the action of the Secretary of State therein is void. *Herbert v. Development Co.*, 179 N. C. 662, 103 S. E. 380.



**§ 7593 (a). Time for registering grants extended.**

That the time is hereby extended until September first, one thousand nine hundred and twenty-six, for the proving and registering of all deeds of gift, grants from the State, or other instruments of writing heretofore executed and which are permitted or required by law to be registered, and which were or are required to be proved and registered within a limited time from the date of their execution; and all such instruments which have heretofore been or may be probated and registered before the expiration of the period herein limited shall be held and deemed, from and after the date of such registration, to have been probated and registered in due time, if proved in due form, and registration thereof be in other respects valid: *Provided*, that nothing in this section shall be held or deemed to validate or attempt to validate or give effect to any informal instrument; and *Provided further*, that this section shall not affect pending litigation: *Provided further*, that nothing herein contained shall be held deemed to place any limitation upon the time allowed for the registration of any instrument where no such limit is now fixed by law. (1924, c. 20.)

**§ 7593 (b). Time for registering grants extended.**

That the time for the registration of grants issued by the State of North Carolina be and the same is hereby extended for a period of two years from January first, nineteen hundred and twenty-five: *Provided*, that nothing herein contained shall be held or have the effect to divest any rights, titles or equities in or to the land covered by such grants, or any of them, acquired by any person from the State of North Carolina by or through any entry or grant made or issued since such grants were respectively issued, or those claiming through or under such subsequent entry or grant. (1925, c. 97.)

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**CHAPTER 129****STATE OFFICERS****ART. 3. THE GOVERNOR****§ 7640. May employ counsel in cases wherein state is interested.**

No department, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except by and with the consent and approval of the Governor. In any case, civil or criminal, in any court in the State or in any other state or territory or in any United States court, or in any other matter, thing, or controversy, of whatever nature or kind, in which the State of North Carolina is interested, the Governor may employ such special counsel

as he may deem proper or necessary to represent the interest of the State, and he may direct the Auditor to draw his warrant upon the Treasurer for such compensation as he may fix for their services. The Attorney-General, with his assistants, shall be counsel for all such departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State, and whenever the Attorney-General shall advise the Governor that it is impracticable for him and his assistants to render legal services to any State agency, institution, commission, bureau or other organized activity, the Governor may employ such counsel as, in his judgment, should be employed to render such services, and he may direct the Auditor to draw his warrant upon the Treasurer for such compensation for their services as he may fix, and he may direct that such warrant be paid out of the appropriations to such department, agency, institution, commission, bureau or other organized activity of the State, or out of the contingent fund. (1925, c. 207, s. 3.)

**Editor's Note.**—No material change in the effect of this section is made by the Act of 1925, although the wording is greatly altered.

### **§ 7642: Form and contents of applications for pardon.**

**Rearrest of Paroled Prisoner.**—Under the provisions of our State Constitution and Statutes, a "parole" granted by the governor to a prisoner imports a conditional pardon, and the governor may cause his rearrest either upon his own admissions, or on such evidence as he may require, for violating the conditions which the prisoner has accepted under the terms of the parole. *State v. Yates*, 183 N. C. 753, 111 S. E. 337.

**Reasonable Conditions Imposed.**—The power of the governor to grant a conditional pardon is generally subject to the limitation that the conditions imposed must not be illegal, immoral or impossible of performance, which do not apply to this case, wherein he is only required not to violate the statute law, and remain of good conduct. *State v. Yates*, 183 N. C. 753, 111 S. E. 337.

**Same—Breach by Prisoner.**—Where the prisoner has accepted his freedom upon the terms of the conditional pardon from the governor, his breach of such conditions avoids the pardon and cancels his right to further immunity from punishment. *State v. Yates*, 183 N. C. 753, 111 S. E. 337.

The essential part of a sentence for a violation of the criminal law is the punishment for the offense committed, and not the time the sentence shall begin and end; and where the prisoner has accepted a conditional pardon from the governor and has obtained his freedom, the breaking of the condition after the term would have otherwise expired, affords no legal excuse why he should not be recommitted to serve out the balance of his sentence. *State v. Yates*, 183 N. C. 753, 111 S. E. 337.

### **§ 7642 (a). Commissioner of pardons.**

The Governor is hereby authorized and empowered to appoint a commissioner of pardons whose duty it shall be to assist the Governor in connection with applications for pardons, commutations and reprieves; that said commissioner shall give his whole time to the State, and when not engaged in duties relating to applications for pardons, commutations and reprieves, he shall devote his time to



such other duties in connection with the executive department of the State government as may be assigned to him by the Governor; that he shall at all times be subject to direction by the Governor, and shall perform his duties under rules and regulations to be prescribed by the Governor. The commissioner of pardons shall hold his position subject to the will of the Governor and shall be subject to removal with or without cause, at any time by the Governor. (1925, c. 29, ss. 1, 2.)

#### **§ 7642 (b). Compensation; expenses.**

Said commissioner of pardons shall receive a salary not to exceed four thousand dollars per annum, payable monthly, shall be allowed not exceeding one hundred and fifty dollars per month for the salary of a stenographer, and shall also be allowed such traveling expenses as may be necessarily incurred in performing the duties of his office, not to exceed two hundred dollars per annum, all of which shall be paid by the Treasurer, on warrants issued by the State Auditor. (1925, c. 29, s. 3.)

### **ART. 4. SECRETARY OF STATE**

#### **§ 7667. Distribution of supreme court reports.**

The supreme court reports shall be distributed by the secretary of state as follows: To the governor, lieutenant governor, attorney-general, treasurer, secretary of state, auditor, superintendent of public instruction, commissioner of labor and printing, commissioner of agriculture, and insurance commissioner, corporation commission, legislative reference library, the justices of the supreme court and judges of the superior courts, the judges of the federal courts residing in the state, the clerks of the supreme and superior courts, and of the United States courts for North Carolina, one copy each; to the supreme court library, twelve copies; to the state library, two copies; to the library of the supreme court of the United States, one copy; to the library of the university [five copies] and to the library of Wake Forest and Trinity colleges, three copies; to each state and territory in the Union, including the District of Columbia, one copy; and to the Dominion of Canada, to the provinces of Canada, and Australia, and to New Zealand, one copy each, and one copy each to each courts in foreign states as the supreme court may direct. (Rev., s. 5357; Code, s. 3635; 1873-4, c. 34, s. 2; 1876-7, c. 164, s. 2; 1881, c. 107; 1881, c. 104, s. 2; 1885, c. 82; 1891, c. 471; 1899, cc. 37, 667; 1903, c. 689; 1919, c. 195, s. 3; 1925, c. 52.)

### **ART. 5. AUDITOR**

#### **§ 7675 (a). Warrants to bear limitations; presented within sixty days.**

From and after March 10, 1925 all warrants drawn by the State Auditor on the Treasurer shall bear, and there shall be printed upon

the face thereof in plain type so as to be easily read, the following words, to-wit: "This warrant will not be paid if presented to the Treasurer after the expiration of sixty (60) days from the date hereof"; and the State Treasurer shall not and he is hereby prohibited from paying any warrant drawn by the Auditor unless the same shall be presented within sixty (60) days from the date of such warrant. (1925, c. 246, s. 1.)

**§ 7675 (b). Surrender of barred warrant; issue of new warrant.**

Any person, firm or corporation holding a warrant drawn by the State Auditor which cannot be paid because of the provisions of section 7675(a) may present the same to the State Auditor, and upon satisfactory proof that such person, firm or corporation is the owner thereof and is entitled to have and receive the proceeds of such warrant and that the obligations for which the warrant is drawn is a subsisting obligation against the State of North Carolina, may surrender said warrant to the Auditor and cancel the same, whereupon the Auditor is authorized and empowered to issue another warrant for like amount in lieu thereof. (1925, c. 246, s. 2.)

**§ 7675 (c). Warrants issued before March 10, 1925.**

Every person, firm or corporation holding a warrant, drawn and issued by the State Auditor prior to March 10, 1925, shall present the same for payment on or before the first day of May, one thousand nine hundred twenty-five. If such warrant is not presented to the State Treasurer for payment prior to the first day of May, one thousand nine hundred twenty-five, the same shall not be paid, but the holder thereof shall be notified of the provision of sections 7675(a) to 7675 (c), and upon satisfactory proof that the holder thereof is the proper owner and is entitled to have and receive the proceeds of such warrant and that the obligation for which the warrant is drawn is a subsisting obligation against the State of North Carolina, the warrant may be surrendered to the Auditor and canceled and the Auditor is authorized and empowered to issue another and new warrant for like amount in lieu thereof. (1925, c. 246, s. 3.)

**§ 7675 (d). Assignments of claims against state.**

All transfers and assignments made of any claim upon the State of North Carolina or any of its departments, bureaus or commissions or upon any State institution or of any part or share thereof or interest therein, whether absolute or conditional and whatever may be the consideration therefor and all powers of attorney, orders or other authorities for receiving payment of any such claim or any part or share thereof, shall be absolutely null and void unless such claim has been duly audited and allowed and the amount due thereon fixed and a warrant for the payment thereof has been issued; and no warrant shall be issued to any assignee of any claim or any part or share thereof or interest therein. (1925, c. 249.)



## ART. 6. TREASURER

**§ 7683 (a). Discretion vested in director of budget.**

The discretion as to the manner of paying annual appropriations prescribed in section seven thousand six hundred and eighty-three of the Consolidated Statutes is hereby vested in the Director of the Budget. (1925, c. 275, s. 9.)

**§ 7685 (a). Emergency arising from destruction of property.**

The Governor and Council of State may authorize and empower the State Treasurer to borrow money on short term notes to meet any emergency arising from the destruction of the State's property, whether used by department or institution, or from some unforeseen calamity not amounting to its destruction, or if the General Assembly through inadvertence has failed to provide support for such department or institution in the general appropriation bill. (1925, c. 210, s. 1.)

**§ 7685 (b). Council of state to recite facts on minutes; limit of issue; form; exemption from taxation.**

The Council of State, when such emergency arises, shall recite upon its minutes the facts out of which it does arise, and thereupon direct the State Treasurer to borrow from time to time money needed to meet such emergency or calamity, not exceeding, however, in the whole, five hundred thousand dollars, and to execute in behalf of the State of North Carolina notes for said money so borrowed to run not exceeding two years, and to bear interest not exceeding five per cent per annum, payable semi-annually. Said notes shall be in such form as the State Treasurer may determine, and the interest thereupon after maturity shall be receivable in payment of taxes, debts, dues, licenses, fines, and demands due the State of any kind whatsoever. The said notes shall be exempt from all State, county, and municipal taxation or assessments, direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise, and the interest thereon shall not be subject to taxation as for incomes, nor shall said notes be subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation. (1925, c. 210, s. 2.)

**§ 7685 (c). Report of action to general assembly.**

At the next ensuing regular or extra session of the General Assembly the Governor and Council of State shall report to it its proceedings in borrowing money, setting out fully the facts upon which they held that an emergency existed which authorized such borrowing. (1925, c. 210, s. 3.)

**§ 7691 (a). Daily deposit of funds to credit of treasurer.**

All funds belonging to the State of North Carolina, in the hands of any head of any department of the State which collects revenue for the State in any form whatsoever, and every institution, agency, officer, employee, or representative of the State, or any agency, department, division or commission thereof, collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, or other designated depository, selected or designated by the State Treasurer, in the name of the State Treasurer, at noon, or as near thereto as may be, and shall report the same daily to said Treasurer: *Provided*, that the Treasurer may refund the amount of any bad checks which have been returned to the department by the Treasurer when the same have not been collected after thirty days trial. (1925, c. 128, s. 1.)

**§ 7691 (b). Treasurer to select depositories; bond.**

The State Treasurer is hereby authorized and empowered to select and designate, wherever necessary, in this State some bank or banks or trust company as an official depository of the State, and the said Treasurer shall require of such depository a bond, or in lieu thereof collateral security for such deposit, consisting of such bonds as are approved for investment by the State sinking fund, as provided for in sections 7472(q) 13 to 7472(q) 25, payable to the State of North Carolina, in a sufficient amount to protect the State on account of any deposit of State funds made therein. (1925, c. 128, s. 2.)

**§ 7691 (c). Deposit in other banks unlawful; liability.**

It shall be unlawful for any funds of the State to be deposited by any person, institution, or department or agency in any place or bank or trust company, other than those so selected and designated as official depositories of the State of North Carolina by the State Treasurer, and any person so offending or aiding and abetting in such offense shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court, and any person so offending or aiding and abetting in such offense shall also immediately become civilly liable to the State of North Carolina in the amount of the money or funds unlawfully deposited, and, at the instance of the State Treasurer, or at the instance of the Governor, the Attorney-General shall forthwith institute the civil action in the name of the State of North Carolina against such person or persons, either in the courts of Wake County, according to their respective jurisdiction, or in the county in which said unlawful deposit has been made, according to the selection made by the officer requesting the institution of such action, for the purpose of recovering the amount of the money so unlawfully deposited, with interest thereon at six per cent per annum, and for the cost of said action,



and the court in which said action is tried may also tax, as a part of the cost in said action, to the use of the State of North Carolina, a sum sufficient to reimburse the State of North Carolina for all expense incidental to or connected with the preparation and prosecution of such action. (1925, c. 128, s. 3.)

**§ 7691 (d). Number of depositories; contract.**

The State Treasurer is authorized and empowered to select as many depositories in one place and in the State as may appear to him to be necessary and convenient for the various officers, representatives and employees of the State, to comply with the purposes of sections 7691 (a) to 7691 (g), and may make such contracts with said depositories for the payment of interest on average daily or monthly balances as may appear advantageous to the State in the opinion of such treasurer and the Governor. (1925, c. 128, s. 4.)

**§ 7691 (e). Accounts of funds kept separate.**

In order to preserve and keep separate all funds that are now required by law to be kept separate or to be separately administered, both by State departments, institutions, commissions, and other agencies or divisions of the State which collect or receive funds belonging to the State, or handle or maintained as trust funds in any form by such department, division, or institutions, shall be evidenced in daily reports by distribution sheets, which shall reflect and show an exact copy of the accounts, showing the distribution of said money kept by such collecting departments, institutions and agencies, and the same shall be entered in the records of the office of the State Treasurer, so as to keep and maintain in the office where the same is first collected or received the same account thereof, and of the distribution thereof, the same records and accounts as are kept in the office of the State Treasurer relating thereto. (1925, c. 128, s. 5.)

**§ 7691 (f). Receipts from Federal government and gifts not affected.**

Sections 7691 (a) to 7691 (g) shall not be held or construed to affect or interfere with the receipts and disbursements of any funds received by any institution or department of this State from the Federal Government or any gift or donation to any institution or department of the State or commission or agency thereof when either in the act of Congress, relating to such funds received from the Federal government, or in the instrument evidencing the said private donation or gift, a contrary disposition or handling is prescribed or required, and the said sections shall not apply to any moneys paid to any department, institution or agency, or undertaking of the State of North Carolina, as a part of any legislative appropriation, or allotment from any contingent fund, as provided by law, after the same has been paid out of the State treasury. (1925, c. 128, s. 6.)

**§ 7691 (g). Auditor to furnish forms; reports; refund of excess payments.**

The State Auditor, by and with the advice, consent and approval of the Governor, shall prescribe and furnish all forms necessary for full compliance with sections 7691 (a) to 7691 (g), and the cost of printing and furnishing the same shall be charged in the printing account of the several departments, institutions and agencies receiving and using such forms, and such daily reports shall be made by mail by those departments, institutions and collecting agencies and officers and employees who are not in the city of Raleigh, when required to make such daily deposits and reports, and, in addition to such daily reports, the Treasurer may require a report, as to the amount deposited, by wire, and all such departments, institutions, agencies, officers and employees, who are at or in the city of Raleigh, when required to make such deposits and reports, shall deliver the same, in person or by messenger, to the State Treasurer, whenever taxes of any kind have been by clerical error, misinterpretation of the law, or otherwise, collected and paid into the State Treasurer in excess of the amount found to be legally due the State. The State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate from the head of the department through which said tax was collected, or his successor in the performance of the functions of that department, and the Treasurer shall pay said warrant. (1925, c. 128, s. 7.)

**§ 7692. Fiscal year.**

The fiscal year of the state government shall annually close on the thirtieth day of June. The accounts of the treasurer, the auditor and the charitable and penal institutions of the state shall be annually closed on that date. (Rev., s. 5378; Code, s. 3360; 1868-9, c. 270, s. 77; 1883, c. 60; 1885, c. 334; 1905, c. 430; 1921, c. 229; Ex. Sess. 1921, c. 7; 1925, c. 89, s. 21.)

**Editor's Note.**—By the Act of 1925 a sentence providing for examination of the accounts of the treasurer, auditor and insurance commissioner by commissioners appointed by the legislature, was omitted.

**§ 7693. Duties of the attorney-general and of the director of the budget.**

The Attorney-General shall, as soon as may be after the first day of each month, compare the warrants drawn by the Auditor on the Treasury during the preceding month with the several laws under which the same purport to have been drawn, and shall certify whether the Auditor had power to draw such warrants, such certificate to be filed with the warrants of the appropriate month. If any are found which, in the opinion of the Attorney-General, the Auditor had no power to draw, such warrants shall be specified in such certificate, accompanied by his reason for the opinion, and a copy of the certificate shall in each instance be furnished forthwith to the director of the budget. Whenever the Treasurer dies or resigns during his



term, or is succeeded at the expiration of his term by another, the director of the budget shall examine or cause to be examined his accounts. The director of the budget shall also examine the warrants drawn on the Treasurer by the officials of the various public institutions of the State whose duty it is to draw such warrants, and the director of the budget shall have the same authority over the warrants drawn by the officials of all public institutions as over the warrants drawn by the Auditor. (Rev., s. 5379; Code, s. 3361; 1868-9, c. 270, ss. 78, 79; 1903, c. 738; 1919, c. 27; 1925, c. 89, s. 21, c. 121, s. 1.)

**Editor's Note.**—This section was repealed in toto by chapter 89 of the Acts of 1925 and reenacted in part by chapter 121, omitting the portion referring to an annual examination of accounts, and in the part which is reenacted substitution "director of the budget" for the "legislative commission."

#### ART. 7. ATTORNEY GENERAL

##### **§ 7695 (a). Assistants; compensation; assignments.**

The Attorney-General shall be allowed three assistants, to be appointed by him, and each of said assistants shall receive a salary of three thousand six hundred dollars (\$3,600) per year, payable monthly. One of said assistants shall be assigned to the State Highway Commission, and shall be paid by said State Highway Commission; another of said assistants shall be assigned to State Department of Revenue and the salary of said assistant so assigned shall be paid by the said Department of Revenue; and the other assistant shall perform such duties as may be assigned by the Attorney-General: *Provided, however*, the provisions of this section shall not be construed as preventing the Attorney-General from assigning additional duties to the assistants assigned to the Highway Commission and the State Department of Revenue as above set forth. (1925, c. 207, s. 1.)

##### **§ 7695 (b). Additional clerical help.**

Since it appears probable that the clerical work in the office of the Attorney-General will be gradually increased by the provisions of section 7695 (a), the Attorney-General shall be allowed such additional clerical help as shall be necessary; the amount of such help and the salary therefor shall be fixed by the Budget Bureau and the Attorney-General. (1925, c. 207, s. 2.)

#### ART. 9. PAYMENT OF PREMIUMS ON BONDS

##### **§§ 7697 (a), 7697 (b). Payment of premiums.**

(Repealed: 1925, c. 275, s. 6.)

## CHAPTER 130

**STATE PRISON**

## ART. 1. GOVERNMENT BY BOARD OF DIRECTORS

**§ 7698. Prison a department of state government.**

The State's Prison shall be and continue a department of the State government and it shall be vested with all the property, real and personal, choses in action and other rights now owned, held or enjoyed by the former corporation known as the State Prison. (1925, c. 163.)

**§ 7699. Directors appointed by governor; term of four years.**

The State Prison Department shall be governed and controlled by a board of directors, except as hereinbefore provided, and this board shall consist of a chairman and six other members, all of whom shall be appointed by the Governor, by and with the advice and consent of the Senate. The term of office of the chairman and the six directors shall be four years, which term shall begin at their appointment by the Governor during the session of the General Assembly of one thousand nine hundred and twenty-five; and quadrennially thereafter. (Rev., s. 5384; 1901, c. 472, ss. 3, 9; 1925, c. 163.)

**§ 7700. Governor may remove directors.**

The Governor is empowered to remove the chairman or any member of the board of directors from office with or without cause. (Rev., s. 5385; 1901, c. 472, s. 13; 1925, c. 163.)

**§ 7701. Governor to fill vacancies.**

Whenever any vacancy shall occur in such board of directors the same shall be filled by the Governor. (Rev., s. 5386; 1899, c. 601; 1925, c. 163.)

**§ 7702. Directors to take oath of office.**

The board of directors shall meet at the State Prison, near Raleigh, or in the city of Raleigh, immediately after their appointment upon notice from the Governor, and after taking the proper oath of office before some person authorized to administer oaths, enter upon the discharge of their duties. Any person appointed to fill a vacancy in such board of directors shall immediately, upon notice of such appointment from the Governor, take the oath of office and enter into the discharge of his duties. (Rev., s. 5387; 1901, c. 472, s. 10; 1925, c. 163.)

**§ 7703. Directors to employ servants and agents.**

The board of directors, by and with the consent and approval of the Governor, are authorized to employ such managers, superin-



tendents and wardens as they may deem necessary; and the board of directors are further authorized to employ such physicians, supervisors, overseers and other servants and agents as they may deem necessary for the management of the affairs of the State Prison Department, and the safekeeping and employment of the convicts therein confined. The compensation and duties of the managers, superintendents and wardens shall be fixed by the board of directors, by and with the consent and advice of the Governor. The board of directors shall fix the compensation of all physicians, supervisors, overseers and other servants and agents, prescribe their duties by proper rules and regulations, and may discharge them at will. Any manager, superintendent or warden may be discharged by the board of directors, by and with the consent and approval of the Governor. (Rev., s. 5387; 1901, c. 472, s. 10; 1925, c. 163.)

**§ 7704. Employees' bonds; money paid to state treasurer.**

The board of directors shall require of its officers, employees, or agents, who may be authorized by law, or hereafter authorized by the board of directors, to collect or receive the moneys and earnings of said institution, to enter into bonds payable to the State of North Carolina in such penal sums as may be approved by the board, with such security or securities, conditioned upon the faithful performance of the duties of such officers, employees or agents in collecting and receiving, and paying over the moneys and earnings of the State Prison. Only such corporate security shall be accepted by the said board as is licensed to do such business within the State of North Carolina. (Rev., s. 5389; 1901, c. 472, s. 7; 1925, c. 163.)

**§ 7705. Acquisition and alienation of property.**

Whenever it may be necessary or convenient in the conduct of the operations of the State Prison Department, or when hereafter expressly authorized by law, such property, both real and personal, as may be desired by the board of directors, by and with the advice, consent and approval of the Budget Bureau, and Governor, and Council of State, may be acquired by gift, devise, purchase, or lease; and all such gifts, devises, purchase or lease shall be made to the State of North Carolina; and whenever it may be necessary or convenient, in the opinion of the said board of directors, by and with the advice, consent and approval of the Budget Bureau and the Governor, and Council of State to dispose of any such property, either real or personal, or any interest or estate therein by lease, subletting, sale or conveyance, such disposal may be effected upon the adoption of the resolution of the board of directors by vote of majority of the board of directors, and approved by the Budget Bureau, and Governor and Council of State. All leases, bills of sale, and conveyance necessary to execute such powers of lease, subletting, sale and conveyance shall be executed in the name of the State of North Carolina by the Governor, attested by the Secretary of State,

with the Great Seal of the State of North Carolina affixed thereto; and such conveyance shall be admitted to registration in the several counties of the State upon such probate as is now required by law for other corporate conveyances. (Rev., s. 5392; 1901, c. 472, ss. 2, 6; 1925, c. 163.)

### **§ 7706. Directors manage property and convicts.**

The board of directors shall have charge of, and, through its agents and employees, manage all the property and effects of the State Prison Department, and conduct the operation of all its affairs subject to the provisions of this chapter. The board of directors may adopt and enforce such rules and regulations for the government of the State Prison Department, its agents and employees and the convicts therein confined as to them may seem just and proper. (Rev., s. 5390; 1901, c. 472, s. 4; 1925, c. 163.)

### **§ 7707. Custody, employment, hiring out and recapture of convicts.**

The board of directors shall make provision for receiving, keeping in custody until discharging by law, all such convicts as may be now confined in said prison and such as may be hereafter sentenced to imprisonment therein by the several courts of this State. The board of directors shall have full power and authority to provide for the employment of such convicts, either in the prison or on farms leased or owned by the State of North Carolina, or elsewhere, or otherwise; and may contract for the hire or employment of any able-bodied convicts upon such terms as may be just and fair, but such convicts so hired, or employed, shall remain under the actual management, control and care of the board of directors, or its employees, agents and servants: *Provided, however,* that no female convict shall be worked on public roads or streets in any manner. (Rev., s. 5391; 1895, c. 194, s. 5; 1897, c. 270; 1901, c. 472, ss. 5, 6; 1925, c. 163.)

### **§ 7707 (a). Recapture of convicts.**

The board of directors may provide for the recapture of convicts that may escape from such prison and may pay such reward and expense of recapture to any person making the same. Any citizen of North Carolina shall have authority without warrant to apprehend any convict who may escape before the expiration of the term of his imprisonment, and to retain him in custody and redeliver him to the State Prison Department. (1925, c. 163.)

### **§ 7708. Reports.**

The board of directors shall make to the Budget Bureau, or to the Governor, a full report of the finances and physical condition of the State Prison Department on the first day of July of each year hereafter, and at such other times as the Governor, or director of the budget, may call for same; and said report shall contain such infor-



mation as may be desired by the Budget Bureau, or the Governor. (Rev., s. 5393; 1901, c. 472, s. 12; 1925, c. 163.)

**§ 7709. Compensation of the board; not eligible to other office or employment in connection with the state prison department.**

Each member of the board of directors shall receive as compensation for his services, four dollars (\$4.00) per day for such days, or fractional parts thereof, as he may be engaged in the duties of said board, together with five (5) cents per mile traveled while in the discharge of his official duties; but the board may allow its chairman a salary in lieu of the per diem and mileage above set forth, and may confer such authority and impose such duties upon him in reference to the management of the institution as it may think proper. No member of the board of directors shall be eligible to any employment in connection with the State Prison Department. (Rev., s. 5394; 1901, c. 472, s. 11; 1925, c. 163.)

**§ 7710. Directors not to furnish supplies.**

No director shall furnish any supplies or materials, directly or indirectly, for the support of the convicts, or for the use of the State Prison Department. (Rev., s. 5395; Code, s. 3429; 1870-1, c. 191, s. 9; 1873-4, c. 158, s. 20; 1879, c. 333, s. 6; 1925, c. 163.)

**§ 7711. Duty of state treasurer and regulation of disbursement of funds for the state prison department.**

All moneys received, or collected, by the State Prison Department, or its agents, officers, or employees thereof, belonging to the State shall be paid to the State Treasurer at such times and in such manner as may be prescribed by law, and in default of any specific requirement otherwise provided by law as to the deposit of same, then the Budget Bureau is hereby empowered and directed to make such rules and regulations for the payment of such funds to the State Treasurer as may in its opinion be just and proper, and in conformity with the policy of the State with reference to the deposit with and payment to the State Treasurer of funds belonging to the State.

The State Prison Department shall hereafter be operated upon legislative appropriations, and disbursements on account of these institutions shall be made by the State Treasurer upon warrants drawn by the State Auditor after the presentation of itemized vouchers, approved by the board of directors, who shall indicate their approval thereon by the signature of the chairman of the board. Duplicates of such vouchers shall be kept and filed in the office of the chairman of the board of directors and the originals thereof shall be kept and filed, after payment, in the office of the State Treasurer. (Rev., s. 5396; 1901, c. 472, s. 8; 1925, c. 163.)

**§ 7712. Work of convicts on public roads.**

The board of directors of the State Prison Department are authorized to work the prisoners committed to their charge on the pub-

lic roads of the State by organizing State camps for housing and feeding the prisoners while at work on such roads, but the construction of such camps must be in accordance with plans approved by the State Highway Commission and the State Board of Health, but if worked upon the public roads of any county or subdivision thereof, then such county or subdivision shall pay to the State Prison such compensation as may be agreed upon by such county, or subdivision thereof, and the board of prison directors. (1917, c. 286, s. 11; 1919, c. 80, s. 6; 1925, c. 163.)

### **§ 7713. Supervision of jails and camps by board of health.**

The State Board of Health shall have the same supervision of all jails, county camps or other places of confinement of county or city prisoners in regard to the method of construction, sanitary or hygienic care as they have over the State Prison Department, and no jail, county camp, or other place of confinement of county or city prisons shall be constructed or used as such for a period of six months, unless the State Board of Health shall have approved the same, and the violation of this section shall constitute a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1917, c. 286, s. 11½; 1925, c. 163.)

### **§ 7714. Sanitary and hygienic care of prisoners.**

The sanitary and hygienic care of the prisoners shall be under the direction, supervision, and regulation of the State Board of Health, and all camps and camp equipment shall conform to the plans and specifications of and be approved by the State Board of Health; and the board of directors of the State Prison shall do such things as may be necessary to carry out the recommendations of the State Board of Health. The supervision of the State Board of Health shall apply to the State Prison, the State farms, and county or State camps or other places where the prisoners are confined or housed, and such recommendations as shall be made by the State Board of Health regarding clothes, bedding, tableware, and bathing for the prisoners shall be carried out by the board of directors of the State Prison. (1917, c. 286, s. 8; 1919, c. 80, s. 4; 1925, c. 163.)

### **§ 7715. Quarters at state farm.**

In order to erect suitable quarters for the prisoners kept at the State farms, the board of directors of the State Prison Department is authorized and directed to spend a sufficient amount of the funds, under the control of the board, for permanent improvements, to pay for the erection of sanitary quarters for the prisoners with individual cells, when cells are deemed necessary, for each prisoner, and the plans and specifications for the erection of such quarters shall be approved by the State Board of Health. (1917, c. 286, s. 14; 1925, c. 163.)



## ART. 2. PRISONERS SENT TO STATE PRISON

**§ 7716. What prisoners sent to state prison.**

All persons convicted of crime punishable by imprisonment in the State Prison in any of the courts of this State whose sentence shall be for five years or more shall be sent to the State prison. (1917, c. 286, s. 1; 1925, c. 163.)

**§ 7717. Convicts sent to place of labor.**

The board of directors shall, as far as practicable, make arrangements for the conveying of convicts from the places where convicted direct to the place where they are to be worked, when it would be to the interest of the State so to do. (Rev., s. 5397; Code, s. 3428; 1879, c. 333, s. 5; 1881, c. 289, s. 2; 1925, c. 163.)

**§ 7718. To be sent within five days.**

The sheriff, having in charge any prisoner sentenced to the State Prison Department shall proceed to send him to the State Prison Department or place of assignment within five days after the adjournment of the court at which he was sentenced, if no appeal has been taken. (Rev., s. 5398; Code, s. 3432; 1869-70, c. 180, s. 3; 1925, c. 163.)

**§ 7719. Copy of affidavit filed with commissioners.**

The sheriff shall file with the board of commissioners of his county a copy of his affidavit as to necessary guard, together with a copy of his itemized account of expenses, both certified to by the auditor as true copies of those on file in his office. (Rev., s. 5399; Code, s. 3437; 1874-5, c. 107, s. 3; 1925, c. 163.)

**§ 7720. State not liable for expenses before convicts received.**

The State is not liable for the expenses of maintaining convicts until they have been received by the State Prison Department authorities, nor shall any moneys be paid out of the treasury for support of convicts prior to such reception. (Rev., s. 5400; Code, s. 3438; 1870-1, c. 124, s. 3; 1925, c. 163.)

## ART. 3. PRISON REGULATIONS

**§ 7721. Board to make regulations.**

The board of directors is authorized to adopt such rules and regulations for enforcing discipline as their judgment may indicate, not inconsistent with the constitution and laws of the State. And they shall print and post the same in the cells of the convicts, and the same shall be read to every convict in the State Prison Department when received. (Rev., s. 5401; Code, s. 3444; 1873-4, c. 158, s. 15; 1925, c. 163.)

**§ 7722. Infraction of rules recorded.**

The board of directors shall require to be kept a book in which shall be entered a record of every infraction of the published rules of discipline, with the name of the prisoner so guilty, and the punishment inflicted therefor, which record shall be submitted to the directors at their monthly meeting. (Rev., s. 5402; Code, s. 3445; 1873-4, c. 158, s. 16; 1899, c. 457; 1925, c. 163.)

**§ 7723. Prisoners classified and distinguished.**

The board of directors of the State Prison Department shall direct the classification of all male prisoners committed to their charge into three classes or grades, as follows: In the first class shall be included all those prisoners who have given evidence that they will, or whom it is believed will, observe the rules and regulations and work diligently, and are likely to maintain themselves by honest industry after their discharge; in the second class shall be included those prisoners who have not as yet given evidence that they can be trusted, but are competent to work and are reasonably obedient to the rules and regulations of the institution; and in the third class shall be those prisoners who have demonstrated that they are incorrigible, have no respect for the rules and regulations, and seriously interfere with the discipline and the effectiveness of the labor of the other prisoners. The men of the first class shall be known as honor men, and when grouped together in camps as hereinafter provided for the camp shall be known as "honor camp," and they shall wear a distinctive but not very conspicuous uniform, and shall be worked without guards, and when in prison or camps, or in any other place of detention, they shall not be chained or under armed guards at night. The men of the second class shall wear a conspicuous uniform, and shall be worked under armed guards, but shall not wear chains, while at work, but may or may not be chained at night, in the discretion of the superintendent. The men of the third class shall be dressed in stripes, shall be worked under armed guards, wear chains during the day, whenever this is considered necessary, and be chained at night when in camp, and shall be worked as far as possible in stockades, inclosing rock quarries, but may be worked on public roads in camps containing only this class of men, at the discretion of the superintendent, or that may hereafter be made by the General Assembly. The classification of male prisoners shall apply to female prisoners so far as it relates to commutation of time and pay for their work. Honor men may be worked wherever any work is being carried on by the prison, provided their privileges and immunities as set forth in this section are in no wise abridged. (1917, c. 286, s. 4; 1919, c. 80, s. 2; 1925, c. 163.)

**§ 7724. Assignment to classes and changes.**

Persons sentenced to the penitentiary, or State Prison Department, for the first time shall be placed in the first or second class, but the assignment of a prisoner to any one of the three classes re-



ferred to in this article shall not be considered to mean that such prisoner must remain in such class, but a prisoner may be changed from a lower to a higher class or from a higher class to a lower class, depending upon his behavior, and it is the purpose and intent of this section to direct the board of directors of the State Prison to encourage and assist the men to improve themselves that they can be transferred from a lower to a higher class or grade. (1917, c. 286, s. 5; 1925, c. 163.)

### **§ 7725. Commutation of time.**

The men of the first class shall be allowed a commutation of their sentence of one hundred and four days for each year served, and the men of the second class shall be allowed a commutation of their sentence of seventy-eight days for each year they serve, and the men of the third class shall be allowed a commutation of their sentence of fifty-two days for each year they serve. If a man remains in the third class for three continuous years, he shall not be allowed any further commutation of time. In the event any prisoner shall be sentenced for a less period of time than one year, said prisoner shall be entitled to a proportionate commutation of his sentence. The board of directors of the State Prison Department, by and with the advice and consent and approval of the Governor, and Commissioner of Public Welfare, may make such regulations and pay such sums to prisoners at the expiration of their sentence as may in their judgment adequately aid such prisoners in securing employment and in defraying their expenses to the place of such employment within this State, or to the place from which said prisoners were sent to the State Prison, having due regard to article eleven, section eleven, of the Constitution, "that all penal and charitable institutions shall be made as nearly self-supporting as is consistent with the purposes of their creation." (Rev., ss. 5402, 5403; Code, s. 3445; 1873-4, c. 158, s. 16; 1899, c. 457; 1901, c. 726; 1911, c. 153; 1917, c. 286, s. 6; 1919, c. 80, s. 3; 1925, c. 163.)

### **§ 7726. Employment at useful labor.**

The board of directors of the State Prison Department shall, through the superintendent, wardens, managers, or officials of the penitentiary, state farms, or reformatories in the State, so far as is practicable, cause all the prisoners in such institutions who are physically capable thereof to be employed at useful labor. (1917, c. 286, s. 3; 1925, c. 163.)

### **§ 7727. Prisoners examined for assignment to work.**

Each prisoner committed to the charge of the board of directors or the State Prison Department shall be carefully examined by a competent physician in order to determine his physical and mental condition, and his assignment to labor and the work he is required to do shall be dependent upon the report of said physician as to his physical and mental capacity. (1917, c. 286, s. 22; 1925, c. 163.)

**§ 7728. Whipping or flogging prisoners.**

It is unlawful for the board of directors of the State Prison to whip or flog, or have whipped or flogged, any prisoner committed to their charge until twenty-four hours after the report of the offense or disobedience, and only then in the presence of the prison physician or prison chaplain; and no prisoner other than those of the third class as defined in this article shall be whipped or flogged at any time. (1917, c. 286, s. 7; 1925, c. 163.)

**§ 7729. Prisoner's supplies and clothes to be marked.**

The prisoner's number shall be used for marking all clothes, bed-clothing, beds, and other supplies used by prisoners, so that when such clothes, bedclothing, and supplies are washed and cleaned they shall be always returned for the use of the same prisoner. (1917, c. 286, s. 9; 1925, c. 163.)

**§ 7730. Uniform for prisoners; felon's stripes.**

It is the duty of the several judicial officers of the State, in assigning any person to work the public roads of any county, to designate in each judgment that such as may be convicted of a felony shall wear felon's stripes, and such as are convicted of a misdemeanor shall not wear felon's stripes. In order to carry into effect the provisions of this section, the State Prison Board shall prescribe a uniform to be worn by persons convicted of felony, and a uniform to be worn by persons convicted of a misdemeanor which shall be different and easily distinguished from the uniform of the felon; but the board of directors of the State Prison Department or other governing authority may in their discretion allow prisoners sentenced for misdemeanor only to wear clothes similar to that worn by the ordinary citizen. The board of commissioners of the respective counties in which convicts are worked on the public roads shall provide uniforms of each kind, except in those cases exempted in this section. (1911, c. 64, ss. 1, 2, 3; 1925, c. 163.)

**§ 7731. Violation as to work in felon's uniform; officer liable.**

It shall be unlawful to work persons convicted of a felony in other than the uniform of a felon, or to clothe a person convicted of a misdemeanor in the uniform of a felon. Any superintendent of convicts or other persons in authority who shall violate this law shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court; and, moreover, be liable in damage to the party aggrieved, to be recovered in a civil action, which may be brought in either the county from which the party was sentenced or the county in which the wrong was done. (1911, c. 64, ss. 4, 5; 1925, c. 163.)



**§ 7732. Recreation and instruction of prisoners.**

The board of directors of the State Prison Department is authorized and directed to arrange certain forms of recreation for the prisoners, and to arrange so that the prisoners during their leisure hours between work and time to retire shall have an opportunity to take part in games, and attend lectures, and take part in other forms of amusement as may be provided by the board. The board is also authorized and directed to make such arrangements as are necessary to enable classes to be organized amongst the prisoners so that those who desire may receive instruction in various lines of educational pursuits. The board of directors shall utilize, where possible, the services of the prisoners who are sufficiently educated to act as instructors for such classes in education; such services, however, shall be voluntary on the part of the prisoner. The board of directors of the State Prison Department is further authorized and directed to make such arrangements as will be necessary so that religious services may be held for the prisoners on Sunday and at such other times as they may deem wise. The attendance of the prisoners at such religious services shall be voluntary. The provisions of this section shall apply to the State Prison Department, State Farms and State Camps. (1917, c. 286, s. 15; 1925, c. 163.)

**§ 7733. Use of intoxicants forbidden to employees.**

No one addicted to the use of intoxicating liquors shall be employed as superintendent, warden, guard, or in any other position connected with the State Prison Department, where such position requires the incumbent thereof to have any charge or direction of the prisoners; and any one holding such position, or any one who may be employed in any other capacity in the State Prison Department, who shall come under the influence of intoxicating liquors, shall at once cease to be an employee of any of the institutions and shall not be eligible for reinstatement to such position or be employed in any other position in any of the institutions. Any superintendent, warden, guard, supervisor, or other person holding any position in the State Prison Department who curses a prisoner under his charge shall at once cease to be an employee of the institution and shall not be eligible for reinstatement. (1917, c. 286, s. 16; 1919, c. 80, s. 8; 1925, c. 163.)

**§ 7734. Correspondence of prisoners regulated.**

The prisoners confined at any State Prison, State Farm, or State Camp who are in the first class or grade authorized by this article shall be allowed general correspondence privileges in so far as such correspondence does not interfere with the work and discipline of the prison, farm, or camp; prisoners who are in the second class or grade shall be allowed similar correspondence privileges, but somewhat more restricted than those in the first class or grade; and prisoners who are in the third class or grade shall only be allowed such

correspondence privileges as may be deemed best by the superintendent. Any prisoner shall be permitted to write a letter to the Governor of the State at any time he desires, and such letter shall be mailed for him as other letters are mailed. (1917, c. 286, s. 17; 1925, c. 163.)

**§ 7735. Divine services; Sunday school.**

The board of directors is authorized to provide for divine service for the convicts each Sunday, if possible, and to secure the visits of some minister at the hospital to administer to the spiritual wants of the sick. (Rev., s. 5405; Code, s. 3446; 1873-4, c. 158, s. 18; 1883, c. 349; 1925, c. 163; 1925, c. 275, s. 6.)

**§ 7736. Religious instruction at Caledonia farm.**

The board of directors of the State Prison Department is authorized and directed, in order to provide religious worship for the prisoners confined in the State's Prison, known as the Caledonia farm, to employ a resident minister of the gospel and to provide for his residence and support in such manner as the board may determine. (1915, c. 125, ss. 1, 2; 1925, c. 163.)

**§ 7737. Parole system regulated.**

(Obsolete: 1925, c. 163.)

**§ 7738. Indeterminate sentence and discharge.**

The various judges of the Superior Courts of North Carolina are authorized and directed, in their discretion, in sentencing prisoners to the State Prison, to pass upon such prisoner a minimum and maximum sentence, thus making the sentence of the prisoner an indeterminate sentence, and the board of directors of the State Prison Department is authorized and directed to consider at least once every six months the cases of such prisoners as have been committed to the State Prison with an indeterminate sentence, as to whether such prisoner is entitled to a discharge, and to take into consideration the prisoner's record since committed to the charge of the board of directors of the State Prison Department: *Provided*, that the prisoner has served the minimum time to which he was sentenced after allowing credit for good behavior as authorized by law. (1917, c. 286, s. 19; 1925, c. 163.)

**§ 7739. Application for pardon to include record.**

Any application for the pardon of a prisoner committed to the discharge of the board of directors of the State Prison shall include a record of such prisoner since he was committed to the charge of the board; and in determining whether or not a parole or pardon shall be granted, consideration shall be given to the record of such prisoner; and the record of such prisoner shall be available to those making the application. (1917, c. 286, s. 20; 1925, c. 163.)



**§ 7740. Prisoners of different races kept separate.**

White and colored prisoners shall not be confined or shackled together in the same room of any building or tent, either in the State Prison or at any State or county convict camp, during the eating or sleeping hours, and at all other times the separation of the two races shall be as complete as practicable. Any officer or employee of either the State or any county in the State having charge of convicts or prisoners who shall violate or permit the violation of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars or imprisoned not more than thirty days. (1909, c. 832, ss. 1, 2; 1917, c. 286, s. 24; 1925, c. 163.)

**§ 7741. Separation of youthful prisoners.**

Youthful convicts shall be kept separate from old and hardened criminals in sleeping quarters. (1917, c. 286, s. 24; 1925, c. 163.)

**§ 7742. Punishment for recaptured prisoners.**

If a prisoner of the first or second class or grade attempts to escape or leaves the State Prison, State Farm, or State Camp without permission, he shall, upon being recaptured, be reduced to the third class or grade and shall permanently lose all his accumulated time and money; and the board of directors of the State Prison Department is authorized and directed to use every means possible to recapture any escaping or leaving, without permission, any of the State Prisons, Camps, or Farms, regardless of expense. (Rev., s. 5407; Code, s. 3442; 1873-4, c. 158, s. 13; 1917, c. 286, s. 73; 1925, c. 163.)

**§ 7743. Recapture of escaped felons; reward.**

It is the duty of the superintendent of the State Prison Department, when any person escapes from the State Prison Department who has been confined or placed to work, to immediately notify the Governor, and to accompany such notice with a full description of the escaped, together with such information as will be of service in the recapture. The Governor is authorized to offer such reward as he may deem advisable and necessary for the recapture and return to the State Prison Department of any person who may escape or who heretofore has escaped therefrom. Such reward earned shall be paid by the Treasurer of the State upon the warrant of the Governor and charged to the penitentiary board, and by said board to be repaid to the State Treasurer, and accounted for as a part of the expense of maintaining the State's prisoners. (1917, c. 236; 1925, c. 163.)

**§ 7744. Copy of this article supplied to prisoners.**

This article shall be printed in pamphlet form and each prisoner committed to the charge of the board of directors of the State Prison Department shall be supplied with a copy, and its contents shall be explained to him at the time he is brought to the State Prison. (1917, c. 286, s. 21; 1925, c. 163.)

**§ 7745. Overseers and guards may maintain discipline.**

When a convict or several combined shall offer violence to any officer, overseer or guard, or to any convict, or attempt to do any injury to the prison building or the workshops, or shall attempt to escape, or shall resist, or disobey any lawful command, the officer, overseer, or guard shall use any means necessary to defend himself, to enforce the observance of discipline, to secure the person of the offender and to prevent an escape. (Rev., s. 5408; Code, s. 3443; 1873-4, c. 158, s. 14; 1925, c. 163.)

**§ 7746. Death of convict investigated by directors.**

It shall be the duty of the board of directors, or some member thereof, upon information of the death of a convict other than by natural causes, to investigate the cause thereof and report the result of such investigation to the Governor, and for this purpose the board of directors, or any member thereof, shall have power to administer oaths, and send for persons and papers. (Rev., s. 5409; 1885, c. 379, s. 2; 1925, c. 163.)

**§ 7747. Convict furnished transportation.**

The Superintendent of the State Prison Department shall furnish to every convict, upon the expiration of his sentence, such transportation and such other money, or property, as may be prescribed by the rules and regulations of the board of directors adopted pursuant to the provisions of section seven thousand seven hundred and twenty-five of the Consolidated Statutes. (Rev., s. 5404; 1893, c. 370; 1925, c. 163.)

**§ 7748. Children born in state prison department.**

Any child born of a female convict while she is in the custody of the State Prison Department that shall not be taken in charge upon arrival at an age suitable to be separated from the mother by some of its kindred or other responsible party, shall, on the application of the deputy warden to the clerk of the Superior Court of the county of Wake, be disposed of as the law provides in the case of children whose parents are dead or unable to provide for them. (Rev., s. 5406; Code, s. 3447; 1873-4, c. 158, s. 19; 1925, c. 163.)

**ART. 4. PAROLES****§ 7749. Governor may parole.**

The Governor may and it shall be his duty to parole such of the convicts in the State Prison Department as may be in his opinion necessary or useful in the upkeep of the State buildings and grounds in Raleigh, and for such other work in connection with any activities in which the State, its departments, or institutions may be engaged, with full power and authority to place such convicts under custody of any person, or persons designated by the Governor, and to cause such convicts to be managed and controlled under his direction, and



to be returned to the State Prison at such times as he may direct, and to make such regulations, or arrangements by which the State Prison Department shall be properly compensated for the labor of such convicts so used. (1925, c. 163.)

### **§ 7750. Record of conduct of prisoners.**

It is the duty of the superintendent of the State Prison Department and superintendents of county chain gangs or road forces, under rules and regulations to be made and promulgated by the board of directors of the State Prison Department, to keep a record of the conduct and demeanor of all prisoners held in the State Prison Department and on county chain gangs. (1917, c. 278, s. 2; 1919, c. 191, s. 2; 1925, c. 163.)

### **§§ 7751-7753. Meetings, etc., of board of parole.**

(Obsolete: Act 1925, c. 163.)

### **§ 7754. No female prison work on streets or roads.**

Nothing in this article shall be held or construed to permit the working or hiring of female convicts for work upon any street, road or highway. (1925, c. 163.)

### **§ 7755. Reimprisonment.**

If the Governor shall order the reimprisonment of any person discharged on parole, he may issue his order directly to the sheriff of any county in the State, directing the arrest of such person and his return by such officer to the State Prison Department, the expense of which shall be paid by the State Treasurer upon a warrant issued by the State Auditor on an order made by the superintendent of the State Prison Department. (1917, c. 278, s. 7; 1925, c. 163.)

### **§ 7756. No deduction of time.**

If any such person be reimprisoned by order of the Governor for violation of the conditions of his parole, the time such person has been out on parole shall not be deducted from the term of imprisonment to which he was originally sentenced by the court, but the time of his imprisonment shall be understood as continuing from the time he was discharged on his parole. (1917, c. 278, s. 8; 1925, c. 163.)

### **§ 7757. No impairment of Governor's powers.**

Nothing herein is to be taken as in any way attempting to interfere with, or regulate the power of the Governor to grant reprieves, commutations, and pardons and paroles. (1917, c. 278, s. 9; 1925, c. 163.)

## **ART. 5. FARMING OUT CONVICTS**

### **§ 7758. Counties and towns may employ.**

It shall be lawful for the board of commissioners of any county, and likewise for the corporate authorities of any city or town to con-

tract, in writing, with the board of directors of the State Prison Department for the employment of convicts in the State Prison Department upon the highways or streets of such county, city or town, and such contracts when so exercised shall be valid and enforceable against such county, city or town, and in the name of the State the Attorney-General may prosecute an action in the Superior Court of Wake County for the enforcement thereof. (Rev., s. 5410; Code, s. 3449; 1881, c. 127, s. 1; 1925, c. 163.)

#### **§ 7759. Duty to hire to counties and towns.**

Upon application to them, it shall be the duty of the board of directors of the State Prison Department, in their discretion, to hire to the board of commissioners of any county, and to the corporate authorities of any city, or town, for purposes specified in the preceding section, such convicts as may be mentally and physically capable of performing the work or labor contemplated and shall not at the time of such application be so hired, or otherwise engaged in labor under the direction of said board of directors; but the convicts hired for services under the preceding section shall be fed, clothed and quartered while so employed by the board of directors, or managers of the State Prison Department. (Rev., s. 5411; Code, s. 3450; 1881, c. 127, s. 2; 1925, c. 163.)

#### **§ 7760. Contract for hire; how enforced.**

The board of commissioners of any county, the corporate authorities of any city or town, so hiring such convicts shall pay into the treasury of the State for the labor of any convict so hired such a sum or sums of money at such time, or times, as may be agreed upon in the contract of hire; and if any such county, city or town, fail to pay the State money due for such hiring, the same shall bear interest from the time it shall become due until paid at the rate of six per cent per annum; and an action to recover the same may be instituted by the Attorney-General in the name of the State in the courts of Wake County. (Rev., s. 5412; Code, s. 3451; 1881, c. 127, s. 3; 1925, c. 163.)

#### **§ 7761. Counties to appoint superintendent.**

The board of commissioners of any county and the corporate authorities of any city or town so hiring such convicts shall have power to appoint and remove at will all such necessary agents to superintend the construction or improvement of such highways and streets as they may deem proper, or to pay the costs and expenses incident to such hiring may levy taxes and raise money as in other respects. (Rev., s. 5413; Code, s. 3452; 1881, c. 127, s. 4; 1925, c. 163.)

#### **§ 7762. Contracts for labor, or products of labor regulated.**

The board of directors of the State Prison Department shall in the case of any and all contracts for labor provide under their direction



and management for the feeding and clothing of such convicts by the State Prison Department and shall maintain, control, and guard the quarters in which such convicts live during the time of such contracts; and the said board shall provide for the guarding and working of such convicts under its sole supervision and control. The board of directors of the State Prison Department may make such contract for the hire of the convicts confined in the State Prison as may, in its discretion, be proper and will promote the purpose and duty to make the State Prison Department as nearly self-supporting as is consistent with the purpose of its creation, as set forth in section eleven, article eleven of the Constitution; and the said board of directors may engage in and use the labor of convicts confined in the State Prison Department in such work on farms, in manufacturing, either within or without the State Prison, as the board of directors may hereafter determine to be proper and profitable to be carried on by the State Prison Department; and the said board of directors may dispose of the products of the labor of said convicts either in farming, or manufacturing, or in other industry at the State Prison or to or for any public institution owned, managed, or controlled by the State, to or for any county, city or town within this State; and may sell or dispose of the same elsewhere and in the open markets or otherwise, as in its discretion may seem profitable. 1917, c. 286, s. 2; 1919, c. 80, s. 1; 1925, c. 163.)

**§ 7763. To make state prison department self-supporting.**

It is the purpose of this chapter to make the State Prison Department self-supporting as contemplated by the Constitution, and to that end the directors thereof are hereby authorized and empowered to employ the convicts therein in such form of work and to transfer such convicts from one form of work and employment to another when in the opinion of such board of directors such form of employment shall best serve the purpose.

It is further declared to be the State's policy in the conduct of the State Prison Department that convict labor shall be devoted primarily to State use, and to that end the board of directors of the State Prison Department shall as a primary purpose employ labor of such convicts in farming and in the production of such material as may be necessarily used by said State Prison Department and other institutions and departments, having due regard at all times to the promotion of the purpose set out in article eleven, section eleven, of the Constitution. (1919, c. 10; 1925, c. 163.)

ART. 6. REFORMATORY

**§ 7764. Directors may establish reformatory.**

There may be established in connection with the North Carolina State Prison Department, under the control and direction of the board of directors of that institution, a reformatory either within

the enclosure of the penitentiary or elsewhere as said board shall deem most practicable and economical, in which reformatory convicts under the age of eighteen years sentenced to the penitentiary shall be confined separate and apart from other convicts. (Rev., s. 5414; 1887, c. 356, s. 1; 1913, c. 72; 1925, c. 163.)

**§ 7765. May exempt from convict garb.**

It shall be in the discretion of the board to exempt the convicts confined in the reformatory from the requirements of wearing the usual convict garb. (Rev., s. 5415; 1887, c. 356, s. 2; 1925, c. 163.)

**§ 7766. Not to apply to certain crimes.**

Nothing in the two preceding sections shall apply to convicts sentenced for the crimes of murder, arson, rape, or burglary. (Rev., s. 5416; 1887, c. 356, s. 3; 1925, c. 163.)

**§ 7766 (a). Supervision and visitation of the state prison department.**

That it shall be the duty of the State Board of Charities and Public Welfare to exercise a supervision over the State Prison Department, as contemplated by the Constitution, under proper rules and regulations; and that the rules and regulations be prescribed by the Governor. (1925, c. 163.)

ART. 7. BUREAU OF IDENTIFICATION

**§ 7766 (b). Bureau established.**

The State bureau to be entitled a Bureau of Identification be and the same is hereby established. (1925, c. 228, s. 1.)

**§ 7766 (c). Director.**

A deputy warden of the State Prison is hereby designated as director of said bureau effective thirty days after ratification of this act, who shall be a finger-print expert and familiar with other means of identifying criminals and who shall have complete control of said bureau within the limits hereinafter prescribed, said director to devote a sufficient portion of his time to the purposes of said bureau and shall maintain the principal offices of the same at the State Prison, and the said bureau with full equipment as herein provided for shall be established and maintained by the board of trustees of the penitentiary out of the general appropriation to the State Prison. (1925, c. 228, s. 2.)

**§ 7766 (d). Duty of bureau.**

It shall be the duty of the said bureau of identification to receive and collect police information, to assist in locating, identifying, and keeping records of criminals in this State, and from other states, and to compare, classify, compile, publish, make available and disseminate.



nate any and all such information to the sheriffs, constables, police authorities, courts or any other officials of the State requiring such criminal identification, crime statistics and other information respecting crimes local and national, and to conduct surveys and studies for the purpose of determining so far as is possible the source of any criminal conspiracy crime wave, movement or coöperative action on the part of the criminals reporting such conditions and to coöperate with all officials in detecting and preventing. (1925, c. 228, s. 3.)

**§ 7766 (e). Henry system maintained.**

The director is required to use and maintain the Henry system. (1925, c. 228, s. 4.)

**§ 7766 (f). Annual report.**

The director of the bureau is directed to submit in his report for the fiscal year ending February first, nineteen hundred and twenty-six, and annually thereafter as a part of the report of the State Prison, a full account of all funds received and expenses to the Governor, and an estimate of what is necessary to carry out the provisions of this article. (1925, c. 228, s. 5.)

**§ 7766 (g). Finger prints taken.**

Every chief of police and sheriff in the State of North Carolina is hereby required to take or cause to be taken on forms furnished by this bureau the finger prints of every person convicted of a felony, and to forward the same immediately by mail to the said bureau of identification. That the said officers are hereby required to take the finger prints of any other person when arrested for a crime when the same is deemed advisable by any chief of police or sheriff, and forward the same for record to the said bureau. (1925, c. 228, s. 6.)

**§ 7766 (h). Seal of bureau; certification of records.**

The director shall provide a seal to be affixed to any paper, record, copy or form or true copy of any of the same in the files or records of the said bureau of identification and when so certified under seal such record or copy shall be admitted as evidence in any court of the State. (1925, c. 228, s. 7.)

**§ 7766 (i). Report of disposition of persons finger printed.**

Every chief of police and sheriff shall advise said bureau of final disposition of all persons finger printed. (1925, c. 228, s. 8.)

## CHAPTER 131

## TAXATION

## Subchapter I. Levy of Taxes

## ART. 1. GENERAL PROVISION

## § 7768. Tax exemptions repealed.

See notes of *Tarbo v. Forbes* under Const. Art. 5, § 5.

**Rentals Applied to Educational Purposes.**—An institution created by statute to provide for the Christian education of boys and girls in a certain locality, and to do other institutional work, in which its property is exempt from taxation as long as it shall be used for “church, school, or charitable purposes,” does not include within its tax exempting terms, either under its charter or under this section, lands from which the rentals are applied to educational purposes alone; in this case, a tract of land three miles distant from that upon which the corporation conducts its operations, a portion of which has been cleared and rented out for a part of the crop, and also used for grazing purposes. *Trustees v. Avery*, 184 N. C. 469, 114 S. E. 696.

**Assessments for Street Improvement.**—While local assessments against lands along the streets of a city for paving and improving the streets may be regarded as a species of tax, and the authority therefor is generally referred to the taxing power, they are not levied and collected as a contribution to the maintenance of the general government, but more particularly confer advantages or improvements on the lands assessed, and do not fall within the intent and meaning of the State Constitution, Art. V, sec. 5, or this section and section 7901; and the city, in assessing private owners, must take into consideration any city property that abuts on the street improved. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

## § 7768 (a). Exemption of notes for building, purchasing, or repairing homes.

Notes, mortgages and all other evidences of indebtedness or any renewal thereof, given in good faith, to build, repair or purchase a home, when said loan does not exceed eight thousand dollars (\$8,000.00), and said notes and mortgages and other evidences of indebtedness or any renewal thereof shall be made to run for not less than one or more than thirty-three years, shall be exempt from taxation of every kind for fifty per cent of the value of the notes and mortgages: *Provided*, the holder of said note or notes must reside in the county where the land lies and there list it for taxation: *Provided further*, that when said notes and mortgages are held and taxed in the county where the home is situated, then the owner of the home shall be exempt from taxation of every kind for fifty per cent of the value of said notes and mortgages. The word “home” is defined to mean land whether consisting of a building lot or larger tract, together with all the buildings and out buildings, which the owner in good faith intends to use as a dwelling place for himself or herself, which shall be conclusively established by the actual use and occupancy of such premises as a dwelling place of the purchaser or owner for a period of three months. (Acts 1925, c. 108.)



## ART. 2. SCHEDULE A. GENERAL TAXES

## § 7772. Rate of inheritance tax.

**Constitutionality.**—The provisions of this section imposing, among others, an inheritance tax upon nonresident distributees under the will of a nonresident testator or upon his distributees under the canons of descent, who are nonresidents, in a corporation domesticated and operating with two-thirds of its property here, under our statute, are not in conflict with Article I, section 17, of the State Constitution or of the Fourteenth Amendment to the Constitution of the United States. *Rhode Island Hospital Trust Co. v. Doughton*, 187 N. C. 263, 121 S. E. 741.

Every presumption is in favor of the constitutionality of a statute, and the legal fiction that shares of stock, being personal property, is considered as being with the person of a nonresident shareholder, will not be so construed as to invalidate a statute taxing its transfer as an inheritance tax. *Rhode Island Hospital, etc., Co. v. Doughton*, 187 N. C. 263, 121 S. E. 741.

**Nature of Tax Imposed.**—The tax imposed upon the transfer of shares of stock in a corporation domesticated under our statute, where the decedent and the legatees or distributees are all nonresidents, is upon the right of succession or on the right of a legatee to take under a will or by a collateral distribution in case of intestacy, and is not a tax on tangible property merely because the amount of the tax is measured in its relation to the value of the corporate property as a whole, and is regarded as in the nature of a ransom or toll levied upon the right to transmit or receive the shares occasioned by the death of the former owner. *Rhode Island Hospital, etc., Co. v. Doughton*, 187 N. C. 263, 121 S. E. 741.

**Reason for Power of State.**—A State creating a corporation has the power to impose an inheritance tax upon the transfer by will or devolution of the stock of such corporation held by a nonresident at the time of his death, by reason of its authority to determine the basis of organization and the rights and liabilities of all of its shareholders therein. *Rhode Island Hospital, etc., Co. v. Doughton*, 187 N. C. 263, 121 S. E. 741.

**Condition Precedent to Transfer of Stock on Books.**—Under the provisions of this section an inheritance or transfer tax is imposed upon the right of nonresident legatees or distributees to take by will or to receive, under the intestate laws of another State, from a nonresident testator or intestate, shares of stock in a corporation of another State domiciled here, under the laws of this State, as a condition precedent to the right to have said stock transferred on the books of the corporation having the statutory proportion of its property located within this State and conducting its business here. *Rhode Island Hospital, etc., Co. v. Doughton*, 187 N. C. 263, 121 S. E. 741.

## ART. 3. PRIVILEGE TAXES

## § 7827. Billiard and pool tables; bowling alleys.

**Constitutionality.**—A license tax imposed upon a business is not void as contravening the State Constitution upon the theory that the statute gives an invalid arbitrary power to the county commissioners with reference to the issuance of the license among applicants therefor, as to locality or otherwise; and the tax so imposed will nevertheless remain, these different portions of the law not being so interdependent that one must fall with the other. *Brunswick-Balke Co. v. Mecklenburg*, 181 N. C. 386, 107 S. E. 317.

**Same—License without City Limits.**—Billiard and pool tables kept open for indiscriminate use by the public are liable to become a source of disorder and demoralization, coming within the police powers, and requiring, in the nature of the business, that power be lodged in some governmental board to withhold or revoke a license imposed by statute for the conduct of

the business, and such power lodged in the board of county commissioners, differentiating as to licenses to be issued within and without the city limits, the latter not subject to the same degree of police protection, and requiring a greater license fee, and certain publicity before the license may be issued, etc., is not an unconstitutional discrimination, or the exercise of an invalid arbitrary power, the decision of the commissioners being reviewable in the courts upon the question of whether this power has been arbitrarily and unjustly exercised. *Brunswick-Balke Co. v. Mecklenburg*, 181 N. C. 386, 107 S. E. 317.

## Subchapter II. Assessment and Listing of Taxes

### ART. 5. ASSESSORS AND LIST-TAKERS

**Editor's Note.**—For a local modification providing for a reassessment in Rockingham County see 1925, c. 105.

#### § 7897. Duties of township list-takers and assessors.

**Valuations Binding on Cities and Towns.** — The valuations properly fixed under the statute by the proper county authorities for purposes of taxation, under this section, are binding upon cities and towns within the same county. *Norfolk-Southern R. Co. v. Board*, 188 N. C. 265, 124 S. E. 560.

**Report Changed by County List-taker.** — Where the county list-taker has changed the report made by the proper clerk of a railroad company in increasing the amount of taxable personalty given in for taxes, which has been adopted by the county commissioners at its proper meeting, and notice thereof given to the said agent of the railroad, and the notice of this change has been turned over to the company's legal department but not acted upon until the list has been placed in the sheriffs hand for the collection of the tax thus increased: It was held, that in the suit of the railroad company to restrain the collection of the tax by the sheriff, the plaintiff may not resist the dissolution of the temporary restraining order upon the ground that it had not received the legal notice of the increase after appropriate action had been taken thereon by the county commissioners. *Norfolk-Southern R. Co. v. Board*, 188 N. C. 265, 124 S. E. \*560.

### ART. 6. ASSESSMENT AND LISTING OF PROPERTY

#### § 7901. What property exempt.

**Local Assessments for Street Improvement.**—While local assessments against lands along the streets of a city for paving and improving the streets may be regarded as a species of tax, and the authority therefor is generally referred to the taxing power, they are not levied and collected as a contribution to the maintenance of the general government, but more particularly confer advantages or improvements on the lands assessed, and do not fall within the intent and meaning of the State Constitution, Art. V, sec. 5, or our statutes, C. S., 7768, and this section; and the city in assessing private owners, must take into consideration any city property that abuts on the street improved. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81.

### ART. 9. ASSESSMENTS BY STATE TAX COMMISSIONERS

#### § 7948. Bank taxation.

**Listing Bank Stock.**—This section changes the policy of the State as declared in ch. 234, sec. 42, Laws of 1917, as to the listing shares of bank



stock by the holders where they reside, and fixing the situs of the shares for taxation for the purpose of county schools and municipal taxation at the residence of the owner, by omitting entirely the requirements of the Act of 1917 that the owner of the shares shall list them at the place of his residence, and by imposing this duty on the cashier of the bank, requiring him to pay the State, county, special and municipal taxes, the intent of the statute being to require the bank to pay all taxes on the shares of its stock where it is located, and to relieve the owners from listing or paying them, except as he may be required to reimburse the bank. *Planters Bank, etc., Co. v. Lumberton*, 179 N. C. 409, 102 S. E. 629.

### Subchapter III. Collection of Taxes.

#### ART. 10. GENERAL PROVISIONS

#### § 7979. Remedy of taxpayer for unauthorized tax.

**In General.**—The General Assembly, as far back as 1887, enacted that demand for the return of taxes must be made within thirty days after payment, and it was held in *Railroad Co. v. Reidsville*, 109 N. C. 494, 13 S. E. 865, and *Wallace v. Teeter*, 138 N. C. 264, 50 S. E. 701, that the statute applied to all taxes, that the remedy provided was exclusive, and that a failure to make demand within the time prescribed was fatal to the right to maintain an action to recover the tax. This section is not in the same language used in 1887, but the same purpose prevails, the same relief is afforded the taxpayers, and it would seem to be broad and comprehensive enough to cover all taxes, and if so the plaintiff cannot recover because he did not demand the return of the tax within thirty days after payment. *Blackwell v. Gastonia*, 181 N. C. 378, 379, 107 S. E. 218.

Under the provisions of this section, a taxpayer may pay the tax assessed by the proper county agents under protest, and bring an action at law to recover the amount so paid upon the ground of its illegality, having observed the statutory provisions as to time, notice, etc., or he may apply for injunctive relief upon the ground of the illegality or invalidity of the assessment so made, or that it was for an unauthorized purpose. *C. S.*, 858. *Norfolk-Southern R. Co. v. Board*, 188 N. C. 265, 124 S. E. 560.

**To test the legality of a tax** imposed, the taxpayer should pay the same and sue to recover it in accordance with the provisions of this section. *Southeastern Express Co. v. Charlotte*, 186 N. C. 668, 120 S. E. 475.

Where the owner resists the payment of taxes as unlawful, he is required to pay them under his protest and sue to recover them. *Carstarphen v. Plymouth*, 168 N. C. 90, 118 S. E. 905.

**Burden on Taxpayer.**—Where a taxpayer seeks equitable relief against the alleged unlawful assessment of taxes against its property by the county authorities, it must allege and show that the amount claimed as excessive was in fact an excessive valuation. *Norfolk-Southern R. Co. v. Board*, 188 N. C. 265, 124 S. E. 560.

**Recovery of License Tax.**—In order to recover a license tax alleged to have been unlawfully demanded by a county, the taxpayer is required to pay the tax under a written protest, and make written demand upon the county treasurer within thirty days, and upon his failure to refund within 90 days the person so paying the tax may maintain his action against the county, including in his demand both the State and county taxes. *Brunswick-Balke Co. v. Mecklenburg*, 181 N. C. 386, 107 S. E. 317.

**Injunctive relief is not available** to the taxpayers of a county, where a tax levy for school purposes has been made, when it appears that under the levy complained of the moneys have been raised and distributed to the branches of government entitled thereto, some of which are not parties to this suit. Semble, the only remedy for the injured taxpayers is to pay the illegal tax under protest and sue to recover the same, as provided by statute. *Galloway v. Board*, 184 N. C. 245, 114 S. E. 165.

**§ 7979 (b). Refund to sellers of farm and dairy products.**

The Commissioner of Revenue shall investigate particular cases brought to his attention and if and after such investigation he finds that the particular license tax has been collected of sellers of farm and dairy products to merchants, he is authorized and empowered upon such finding to refund the tax so collected to the individuals from whom it was collected. (1925, c. 56.)

**§ 7979 (c). Amendment of certain acts.**

Wherever the words, "the Secretary of State" occur in chapter fifty-five of the Consolidated Statutes of one thousand nine hundred and nineteen, or sections twenty-eight, twenty-nine, thirty, thirty-two, thirty-three, thirty-four, thirty-five, and thirty-six of chapter two of the Public Laws of one thousand nine hundred and twenty-one, or chapter ninety-seven of the Public Laws, extra session of one thousand nine hundred and twenty-one, or chapter two hundred and thirty-six of the Public Laws of one thousand nine hundred and twenty-three, or in any law enacted, or to be enacted, at the present (one thousand nine hundred and twenty-five) session of the General Assembly, amending any of the laws enumerated herein, or relating to the subject matter thereof, they shall be stricken out and the words "Commissioner of Revenue" be substituted in their stead, to the end that the administration of all the laws relating to the licensing and taxing of motor vehicles, to the taxing of motor vehicle fuels, and to the protection of title of motor vehicles, may be committed to said Commissioner of Revenue. (1925, c. 158, s. 1; 1925, c. 258, ss. 1, 2.)

**§ 7979 (d). Transfer of duties to commissioner of revenue.**

All the duties, authority and powers conferred upon the Secretary of State in the acts, recited in the preceding section or in any other act relating to the same subject, are hereby expressly conferred upon said Commissioner of Revenue. (1925, c. 158, s. 2; 1925, c. 258, ss. 1, 2.)

**§ 7979 (e). Building for department of revenue.**

When the Department of Revenue shall have moved to the building authorized by chapter 70 of the Public Laws, Extra Session of 1924, then the board of public buildings and grounds shall, in their discretion, assign the present quarters of the Department of Revenue, to such uses as may appear proper, in order to use the same to the best interests of the State. (1925, c. 158, s. 4.)

**§ 7979 (f). Transfer of duties from insurance commissioner.**

All the duties, powers and privileges which heretofore have been, or which may be, at this session of the General Assembly,



imposed upon the Insurance Department and the Insurance Commissioner and his subordinates, with reference to the collection of any taxes, licenses, or fees, including any and all funds for the benefit of the State revenue, are hereby transferred to and imposed upon the Revenue Department and the Commissioner of Revenue, with the same force and effect as if the same had been originally imposed upon him. This section shall not deprive or take from the Insurance Department the imposition, computation, or assessment, or determination of the amount of any tax, license, or requirement to pay money for the benefit of the State, and the said Insurance Department shall continue to exercise said duties, powers and privileges, but when the same shall have been determined or fixed, or computed, or assessed, or due, the said Insurance Department shall immediately notify, in writing, the Revenue Department, stating the amount and the purpose thereof, and the firms, persons or corporations by whom the same may be due, and the said Revenue Department shall immediately proceed in the collection thereof, with all the powers, privileges and authorities heretofore imposed upon the Insurance Department. (1925, c. 158, s. 5.)

### **§ 7979 (g). Collection of motor "bus" licenses, fees, and taxes.**

All fees, taxes, licenses, or other charges, to be paid, pursuant to laws enacted at the present session of the General Assembly or hereafter, by any and all "bus" lines, "for hire" cars, jitneys, including all such carriers by whatever name called, shall be collected by the Commissioner of Revenue, and the words "Commissioner of Revenue" are hereby inserted in such laws, and all amendments thereto, in the place and stead of the words "Secretary of State," in so far as the collecting of such fees, licenses, taxes or other charges which are to be paid by the said "bus" lines, "for hire" cars, jitneys and such carriers, by whatever name called, is provided for, and the Corporation Commission shall perform all other duties therein provided for, including the approval and acceptance of forms and bonds, except such duties as are to be performed by the State Highway Commission, and which are prescribed in an act ratified February twenty, nineteen hundred and twenty-five, entitled "An act providing for the regulation; supervision and control of persons, firms, corporations and associations owning, controlling, operating or managing motor vehicles used in the business of transporting persons or property for compensation. (Sections 2613(j) et seq.) (1925, c. 158, s. 5a.)

## **ART. 12. TAX LIENS.**

### **§ 7986. No lien on personalty.**

**In General.**—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon (C. S., this section and section 2815,) subject to certain exemptions specified in

Const., Art. V, secs. 3 and 5. *Carstarphen v. Plymouth*, 186 N. C. 90, 118 S. E. 905.

**Priority over Mortgage.**—The lien of a license tax on a business is superior to that of a chattel mortgage on the property therein used, and the amount thereof is not abated by reason of an unexpired year. *Brunswick-Balke Co. v. Mecklenburg*, 181 N. C. 386, 107 S. E. 317.

### § 7987. Lien on realty.

**Subsequent Purchaser Subject to Lien.**—Where a manufacturer of automobiles or a receiver appointed for him has failed to pay the license or privilege tax imposed by the Revenue and Machinery acts, this section, construed in *pari materia* expressly provides that a lien therefor shall attach to all real estate of the taxpayer situated within the county, etc., and continue until such taxes, with any penalty and cost which shall accrue thereon shall have been paid, and the lien may be enforced by the State, etc., for each tax year accordingly, and a subsequent purchaser of the manufacturing plant is subject to the lien for the nonpayment of the taxes, and it is enforceable against the realty. *Vaughan v. Lacy*, 188 N. C. 123, 123 S. E. 478.

### § 7990. Tax lien enforced by action to foreclose.

**In General.**—Taxes duly assessed on real property are declared by statute a lien thereon from a given date enforceable by action as well as by levy and sale, and the tax list, in the collector's hands, with the fiat of the register as clerk of the board of commissioners endorsed thereon, are declared by statute to have the force and effect of a judgment and execution. *Wilmington v. Moore*, 170 N. C. 52, as to actual levy upon personal property required before claim and delivery, cited and distinguished. *Cherokee v. McClelland*, 179 N. C. 127, 101 S. E. 492.

## ART. 13. TIME AND MANNER OF COLLECTION.

### § 8005 (a). Collection of arrears of tax for years 1915 to 1924; authority of personal representatives.

All sheriffs and tax collectors who, by virtue of their office, have had the tax lists for the purpose of collecting the taxes of their respective counties, towns and school districts in their hands for the years one thousand nine hundred and seventeen, one thousand nine hundred and eighteen, one thousand nine hundred and nineteen, one thousand nine hundred and twenty, one thousand nine hundred and twenty-one, and one thousand nine hundred and twenty-two, [one thousand nine hundred and twenty-three, one thousand nine hundred and twenty-four] and in case of death or default in collection, their personal representatives, bondsmen, or any agent that they may designate, are authorized and empowered to collect arrears of taxes for each of the years aforesaid, under such rules and regulations as are now or may hereafter be provided for the collection of taxes. (1923, c. 108, s. 1; 1925, c. 80, s. 1.)

### § 8005 (d). Term of authority.

The authority given in sections 8005(a) and 8005(b) shall cease and determine on the first day of January, [one thousand nine hundred and twenty-seven]. (1923, c. 108, s. 4; 1925, c. 80, s. 2.)



## ART. 14. TAX SALES.

**§ 8011. Sale conclusive as to liability.**

See notes to § 8037.

**§ 8019. Land listed in wrong name.**

**Notice in Section 8028 Mandatory.**—Under this section the listing in the wrong name does not make the sale void. This, however, does not make less mandatory the requirement (C. S. sec. 8028) that the notice shall state "in whose name it was taxed." *Price v. Slagle* (N. C.), 128 S. E. 161, 165.

**§ 8028. Purchaser to give notice.**

See note to section 8019.

**Relation to Section 990.**—Section 990 declaring the common law to be in force, first enacted in North Carolina in 1715, re-enacted in 1778, and successively with each complete re-enactment of our statute law, and finally in 1919, must be construed as a part of the same act as this section. *Price v. Slagle* (N. C.), 128 S. E. 161, 166.

**Construed in Favor of Landowner.**—"Unless these provisions as to notice, which are required to be performed by the tax sale purchaser, are liberally construed in favor of the landowner, and strictly construed against divesting him of his estate, injustice may often result, and, in some cases, this may amount to oppression." *Price v. Slagle* (N. C.), 128 S. E. 161, 165.

**Strict Compliance Necessary.**—"Ministerial officers who conduct proceedings in tax sales, and especially purchasers thereat, are required to comply with these provisions which bring notice to the citizen that his land is about to be lost; and if the title to the citizen's land is divested from him, it must be upon a strict and clear compliance with the express limitations and provisions fixed by the law itself. *Price v. Slagle* (N. C.), 128 S. E. 161, 165.

In *Price v. Slagle* (N. C.), 128 S. E. 161, 165, the court said: "The requirement of notice of the defaulting taxpayer, who is the landowner, may be prescribed and regulated within reasonable limits by the Legislature, but cannot be dispensed with. Such a requirement is subject to the test of "due process of law." The duty of the purchaser who elects to pursue the statutory method of foreclosure, as distinguished from foreclosure by judicial process in the courts, as required at the time of the instant tax sale, is absolute to follow, in strict compliance all mandatory and essential requisites to the validity of his title. This notice to the delinquent landowner is one of the mandatory and essential requisites."

**Presumption As to Notice From Sheriff's Deed.**—"No presumption arises from the sheriff's deed that proper notice was given to the landowner by the purchaser, as required by the statute." *Price v. Slagle* (N. C.), 128 S. E. 161, 165.

**§ 8029. Affidavit of purchaser.**

See note to § 8034.

**Prerequisite to Validity of Deed.**—The affidavit required by this section is a necessary prerequisite to the validity of the tax deed. *Price v. Slagle* (N. C.), 128 S. E. 161, 165.

**Insufficient Affidavit.**—Where the affidavit stated that the land was taxed in the name of Ector, while the tax book showed the name Price in parenthesis after the name Ector, the affidavit is not sufficient. *Price v. Slagle* (N. C.), 128 S. E. 161.

**Requirement as to Notice.**—"When a copy of the published notice does not appear as a part of the affidavit, we are constrained to hold

that the mandatory character of this statute requires the affidavit to state the time of the expiration of the period for redemption by giving the date at which it expires." *Price v. Slagle* (N. C.), 128 S. E. 161, 166.

### § 8034. Tax deed presumptive evidence.

**In General—Proof of Affidavit Affecting Validity of Tax Deed.**—Under the provisions of section 8029, it is required that a purchaser at the sheriff's sale of land for taxes show, by affidavit, a compliance with the provisions of the statute, and present it to the one authorized by law to execute the tax deed, and by such officer delivered to the register of deeds for entry of record, which must be by evidence outside the deed, and there being no presumption under this section of said chapter that this has been done, in the absence of such proof, the purchaser acquires no title. Sections 60, 70, and 71 of the acts of 1887, relating specifically to matters and things required to be done by the purchaser at a tax sale, to perfect his title to the lands, are omitted by the Act of 1889, while section 74 of the former act, relating to presumptions, is expressly brought forward with practically no modifications, and hence a tax deed made under the provisions of the act of 1889 is valid without proof of the affidavit, etc., required by the act of 1887. *Richmond Cedar Works v. Shepard*, 181 N. C. 13, 105 S. E. 886.

**Inapplicable to Defective Deed.**—If a deed has not been made pursuant to, that is, according to, or in conformity with, the statutory provisions, then this provision in the statute does not apply. *Price v. Slagle* (N. C.), 128 S. E. 161, 165.

### § 8035. Adjustment on sale by mistake.

**Foreclosure by Judicial Process.**—"C. S. §§ 8035, 8036, 8037, provide another remedy for the purchaser at a tax sale, whereby he may have foreclosure by judicial process, in addition to his rights under C. S. §§ 8028, 8029, 8030, to demand from the sheriff the tax deed." *Price v. Slagle* (N. C.), 128 S. E. 161, 166.

### § 8037. Purchaser may foreclose.

Every holder of a certificate of sale of real estate for taxes shall be subrogated to the lien of the state and of the county or other municipal corporation, for the taxes for which such real estate was sold, and, instead of demanding a deed for such real estate under the provisions of this chapter, shall be entitled to a judgment for the sale of such real estate for the satisfaction of whatever sums may be due to him upon such certificate of sale and for any other amounts expended by him upon any other certificate of sale of such real estate, or for taxes paid which were a lien upon such real estate, whether paid prior or subsequent to the acquisition of such certificate of sale. Such relief shall be afforded in an action in the nature of an action to foreclose a mortgage, which action must be commenced within two years from the date of the last certificate of sale held by the plaintiff. Such action shall be governed in all respects, as near as may be, by the rules governing actions to foreclose a mortgage. Any one who has paid taxes on the subject-matter of the action, or who holds a certificate of sale thereof, may be made a party and his rights enforced therein.

In such action the plaintiff must show that he gave ten days written notice of his intention to commence the same to the owner or occupant of the real estate which it is sought to sell; and in the



complaint filed in such action each certificate of sale held by the plaintiff and each sum expended by him for taxes on such real estate shall be set out as a separate cause of action. Inability to find the owner or occupant in the county shall excuse a failure to notify him of plaintiff's intention to sue.

The holder of a deed for real estate sold for taxes shall be entitled to the remedy provided by this section, if he elects to proceed thereunder. He must commence such action within two years from the last deed or certificate of sale held by him.

Every county or other municipal corporation shall have the right to foreclose for taxes under the provisions of this section, and it shall be the duty of its commissioners or other governing body or officials to institute and diligently prosecute such actions for all taxes on real estate for which it holds tax sale certificates or deeds remaining unredeemed as much as four years from the dates of such instruments. No such actions by such corporations shall be barred by the lapse of time as is above provided in this section, or by law for other actions, but only by the lapse of five years from the delivery of the certificate of sale or deed sought to be foreclosed.

In every action brought under this section, whether by a private individual or by the county or other municipal corporation, or any other corporation, the plaintiff shall, except in cases otherwise provided by law, be entitled to recover interest at the rate of twenty per centum per annum on all amounts paid out by him, or those under whom he claims, and evidenced by certificates of tax sale, deed under tax sale, and tax receipts. Such interest shall be computed from date of each payment up to the time of redemption or final judgment, and shall be added to the principal of the final judgment, which judgment shall bear interest as in other cases. [Whenever any action for foreclosure is instituted in behalf of any county or municipal corporation under the provisions of this section, it shall be lawful for and the duty of the court to include in the judgment as a part of the costs a reasonable allowance to the attorney of the county or municipal corporation bringing such action for his services rendered therein, in lieu of all other fees or commissions for such service: *Provided*, that such fee so to be allowed shall not be less than ten (\$10.00) dollars. The board of county commissioners shall not remit any of the penalties prescribed by this section after action is brought for foreclosure as aforesaid.] (Rev., s. 2913; 1901, c. 558, ss. 35, 36, 44; 1925, c. 109.)

**In General.**—The lien on realty given for taxes and assessments due thereon is enforceable by action in the nature of an action to foreclose a mortgage, in which judgment may be entered for its enforcement, "together with interest penalties and costs allowed by law and costs of action," the action to be prosecuted in the name of the county when the lien is in favor of the State and county, and the holder of the certificate of purchase at a tax sale may institute such action to enforce collection of the amount due on giving the owner or occupant of the land ten days written notice of his purpose to bring the suit, his inability to find such

owner or occupant excusing the failure to give such notice, and every county or other municipality is given the right, and it is made its duty, to prosecute said suits, and whether by private individuals or by the county or by other municipal corporations, the plaintiff shall, except in cases otherwise provided by law, recover interest at the rate of 20 per cent on all amounts paid out by him, or those under whom he claims, as evidenced by certificates of tax sales, deeds thereunder, or tax receipts, etc. *Cherokee v. McClelland*, 179 N. C. 127, 101 S. E. 492.

**Resisting Judgment—Notice.**—Where the lands of the owner have been regularly listed for taxation, sold for the nonpayment thereof after public notice given, of which the owner was fully aware, and bought in by the county at the tax sale, regularly had, and the ten days statutory notice had been served on him of the purchaser's purpose to bring the present suit, the defendant is held to the payment of the 20 per cent allowed by statute, and he may not successfully resist judgment therefor on the ground that the notice of the sale had not been given him as required by tending the amount of the taxes levied, and six per cent interest thereon. *Cherokee v. McClelland*, 179 N. C. 127, 101 S. E. 492.

**Same—Personal Property Available.**—The enforcement of the lien on realty given by our statutes by action, etc., by a municipality or county that has purchased at the sale, may not be avoided on the ground that the owner had personal property available from which the taxes on the realty should first have been collected. *Cherokee v. McClelland*, 179 N. C. 127, 101 S. E. 492.

#### ART. 15. SHERIFF'S SETTLEMENT OF TAXES

### § 8042. Time and manner of settlement.

**Drainage Assessments.**—The relevant sections of the various statutes upon the subject of the collection of assessments on lands in drainage districts by sheriffs and tax collectors, and their compensation therefor, being in *pari materia*, should be construed together by the courts in ascertaining the legislative intent. *Commissioners v. Davis*, 182 N. C. 140, 108 S. E. 506.

A drainage district is not a political division of the State, and assessments to be levied for their maintenance differs from a tax to be levied and collected for State, county, township, and school districts, "and other purposes whatsoever," such other purposes being construed as meaning taxes collected for purposes of general government, and do not extend to drainage assessments. *Commissioners v. Davis*, 182 N. C. 140, 108 S. E. 506.

**Same—Sheriff's Fee.**—By ch. 67, Laws 1911, certain sections of the general drainage act of ch. 442, Laws 1909, were repealed, and certain other sections substituted, leaving in force section 29 of the latter act, providing for the continuance of a drainage district established thereunder, under a board of commissioners, for maintenance, with authority to levy assessments for that purpose to be collected by the sheriff or tax collector of the county: Held, Rev., 5245 (now this section), under the title of sheriffs and tax collectors, allowing them a commission of 5 per cent on "assessments collected," refers only to taxes collected for general governmental purposes, and not to assessments in drainage districts imposed for the special benefits to the lands therein, and commissions on assessments for maintenance are limited to 2 per cent by Laws 1909; and this construction is not affected by the repeal of sec. 36, Laws 1909, by ch. 152, sec. 2, Laws 1917. *Commissioners v. Davis*, 182 N. C. 140, 108 S. E. 506. See notes to §§ 5350, 5360.

### § 8050. Auditing accounts of officers.

The board of county commissioners, at their last regular or other subsequent meeting in each year, shall appoint one or more of their



number, not to exceed three, to be present at the accounting and settlements between the sheriff and county treasurer provided for in the preceding section, and also to audit and settle accounts of the county treasurer and all other county officers authorized to receive or disburse county funds. The account so audited shall be reported to the board of county commissioners, and when approved by them shall be filed with the clerk and recorded on his book, and shall be prima facie evidence of their correctness, and impeachable only for fraud or special error: *Provided*, the compensation allowed the committee for their services shall not exceed three dollars per day each for the time actually spent in said settlements, and there shall be no allowance for extra clerical aid. [Whenever any ex-sheriff or ex-tax collector, of any county, or tax district, has collected taxes for said county or district for more than one year and has settled in full with the proper officers for said taxes for any and all previous year or years, as provided by law, and it shall be made to appear that there were specific errors or mistakes made against said ex-sheriff or ex-tax collector in any such settlement or settlements, the county commissioners shall have authority to correct any such errors or mistakes and give said ex-sheriff or ex-tax collector credit for the amount of any such errors or mistakes so made against him on his final settlement upon his going out of said office.

In all actions for settlement for taxes due any county or special tax district by any ex-sheriff or ex-tax collector for taxes collected for the last year such ex-sheriff or ex-tax collector collecting said taxes shall receive as a credit by way of set-off or counterclaim against any amount for which he may be found liable for such year, any amount that he may have overpaid such county or tax district for any previous year.] (Rev., s. 5251; 1917, c. 234, s. 108; 1919, c. 92, s. 108; 1925, c. 254.)

### § 8051. Penalty for failure to account with county.

**Failure to Appoint Auditing Committee.**—Where a sheriff of a county has failed to make settlement of money collected for taxes, as required by law, but has unsuccessfully sought to obtain an extension of time from the county commissioners, he may not successfully resist the statutory penalty under the provisions of this section on the ground that the county board of commissioners had not appointed a committee to audit the account between him and the treasurer, especially when the commissioners had appointed a special auditor who could have acted on the account at any time. *State v. Gentry*, 183 N. C. 825, 112 S. E. 427.

**When Penalty Recoverable.**—The penalty of \$2,500 recoverable as a forfeiture against a sheriff under the provisions of this section is where he fails, neglects, or refuses to make settlement or to render an account to the county treasurer and auditing committee upon demand; or his failure, neglect or refusal to pay over the amount rightfully found to be due after account had or settlement made; and a recovery of such penalty may not be properly allowed in a judgment upon an affirmative finding, in an action where the cause was heard and determined upon the single question as to whether the defendant sheriff had failed to pay over the amount which the plaintiff claimed to be due. *State v. Gentry*, 183 N. C. 825, 112 S. E. 427.

## CHAPTER 132

**UNITED STATES LANDS****§ 8059 (a). Further authorization of acquisition of land.**

The United States is hereby authorized to acquire lands by condemnation or otherwise in this State for the purpose of preserving the navigability of navigable streams and for holding and administering such lands for National Park purposes: *Provided*, that this section and the following section shall in no wise affect the authority conferred upon the United States and reserved to the State in sections eight thousand fifty-seven (8057) and eight thousand fifty-eight (8058) of the Consolidated Statutes. (1925, c. 152, s. 1.)

**§ 8059 (b). Condition of consent granted in preceding section.**

This consent is given upon condition that the State of North Carolina shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the State of North Carolina against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this consent had not been given. (1925, c. 152, s. 2.)

## CHAPTER 133

**WEIGHTS AND MEASURES****ART. 3. COUNTY STANDARD-KEEPER****§ 8071. Testing and marking standards; penalty.**

Every person, firm, or corporation using weights and measures of any and every kind which shall be used in buying or selling or bartering, or for hire, or in fixing or determining the amount of toll or charge or rate for any service shall allow or permit the standard-keeper of the county to try, examine, and adjust by the standard, at least once every [year], all the said weights and measures of any and every kind used as aforesaid, and every person, firm, or corporation who shall neglect to comply with the requirements of this section shall forfeit and pay fifty dollars, to be recovered at the suit of the standard-keeper, one-half to his use and the other half to the use of the county wherein the default occurs. It shall be the duty of the standard-keeper, when practicable, to mark, by stamp or brand, the weights or measures found or made to agree with the standard, and shall give a certificate of such examination and adjustment, stating the weights and measures examined and adjusted. (Rev., s. 3073; 1909, s. 695; 1925, c. 299.)



## CHAPTER 135

**CONCERNING THE CONSOLIDATED STATUTES****§ 8106. What statutes not repealed.**

The provisions of a special local act creating a county court, relating to the filing of pleadings, etc., are not repealed by the general statute. *Union Guano Co. v. Middlesex Supply Co.*, 181 N. C. 210, 106 S. E. 832.

**§ 8107. Consolidated statutes effective August 1, 1919.**

**Requirements of Section 6367 Applicable to Domestic Corporation.—**The requirements of C. S., 6367 as to soliciting the purchase of shares of stock in a certain corporation in accordance with certain conditions, applies by statutory amendment of 1919, not only to corporations formed in other states, but also to domestic corporations. *Seminole Phosphate Co. v. Johnson*, 188 N. C. 419, 124 S. E. 859.

**§ 8108. Adoption of volume three of the consolidated statutes.**

The chapters, subchapters and sections of the codification of the Public Laws enacted since the compilation of the Consolidated Statutes of North Carolina, as set out and contained in the publication known as volume three of the Consolidated Statutes of North Carolina, which codification and publication is provided for under chapter eighty-six, Public Laws of nineteen hundred and twenty-three, be adopted as constituting the Public Laws enacted since the publication of the Consolidated Statutes of North Carolina and previous to April first, nineteen hundred and twenty-three: *Provided*, that this section shall not have the effect of repealing any existing law and that it shall not be necessary to republish said statutes.

That such chapters, subchapters and sections as are referred to above shall be and constitute volume three, Consolidated Statutes of North Carolina. (1925, c. 99.)

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## COMMISSIONS—Continued.

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County officers, const. art. VII, § 1.

Counties to be divided into districts, const. art. VII, § 3.

County commissioners, const. art. VII, § 1.

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Special courts in cities, const. art. IV, § 14.

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Criminal law—Continued.

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Abolition of distinction between actions at law and suits in equity, and feigned issues, const. art. IV, sec. 1.

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Duties of Governor, const. art. III, § 5.

Duties of other executive officers, const. art. III, § 13.

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Officers whose appointments are not otherwise provided for, const. art. III, § 10.

Qualifications of Governor and Lieutenant-Governor, const. art. III, § 2.

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Powers in relation to divorce and alimony, const. art. II, § 10.

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Private laws in relation to names of persons, etc., const. art. II, § 11.

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General warrants, const. art. I, § 15.

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The legislative, executive, and judicial powers distinct, const. art. I, § 8.

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Governor to make appointments, const. art. XIV, § 5.

The legislative, executive, and judicial powers distinct, const. art. I, § 8.

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Exemption of personal property, const. art. X, § 1.

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Husband may insure his life for the benefit of wife and children, const. art. X, § 7.

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Property of married women secured to them, const. art. X, § 6.

Houses of correction, const. art. XI, § 4.

Houses of refuge, const. art. XI, § 5.

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Immigration.

Department of agriculture, immigration, and statistics, const. art.

III, § 17.

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Necessity of, const. art. I, § 12.

Imprisonment.

Imprisonment for debt, const. art. I, § 16.

Law of the land, const. art. I, § 17.

Persons restrained of liberty, const. art. I, § 18.

Imprisonment for debt, const. art. I, § 16.

Indictments and presentments.

Indictments, const. art. XIV, § 1.

Necessity of, const. art. I, § 12.

Inebriates, const. art. XI, § 9.

Inferior courts, const. art. IV, § 2.

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## CONSTITUTION OF NORTH CAROLINA—Continued.

## Judges—Continued.

Salaries not to be diminished, const. art. IV, § 18.

Special terms, const. art. IV, § 11.

Supreme Court justices, const. art. IV, § 6.

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## Judicial department, const. art. IV, §§ 1-33.

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Abolition of distinction between actions at law and suits in equity, and feigned issues, const. art. IV, § 1.

Amendments not to vacate existing offices, const. art. IV, § 33.

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Clerk of the Supreme Court, const. art. IV, § 15.

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Disposition of actions at law and suits in equity pending when this Constitution shall go into effect, etc., const. art. IV, § 20.

Division of judicial powers, const. art. IV, § 2.

Election of Superior Court clerk, const. art. IV, § 16.

Election, terms of office, etc., of justices of the Supreme and judges of the Superior courts, const. art. IV § 21.

Fees, salaries and emoluments, const. art. IV, § 18.

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In case of waiver of trial by jury, const. art. IV, § 13.

## Judges.

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Judicial districts for Superior Courts, const. art. IV, § 10.

Jurisdiction of courts inferior to Supreme Court, const. art. IV, § 12.

Jurisdiction of justices of the peace, const. art. IV, § 27.

Jurisdiction of Supreme Court, const. art. IV, § 8.

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Removal of clerks of the various courts for inability, const. art. IV, § 32.

Removal of judges of the various courts for inability, const. art. IV, § 31.

Residences of judges; rotation in judicial districts; special terms, const. art. IV, § 11.

Sheriffs, const. art. IV, § 24.

Solicitors for each judicial district, const. art. IV, § 23.

Special courts in cities, const. art. IV, § 14.

Supreme Court justices, const. art. IV, § 6.

Term of office, const. art. IV, § 17.

Terms of office of first officers, const. art. IV, § 26.

Terms of the Supreme Court, const. art. IV, § 7.

Transaction of business in the Superior Courts, const. art. IV, § 22.

Treason against the state, const. art. IV, § 5.

Vacancies, const. art. IV, § 25.

Vacancies in office of justices, const. art. IV, § 28.



## CONSTITUTION OF NORTH CAROLINA—Continued.

## Judicial department—Continued.

Vacancies of office of Superior Court clerk, const. art. IV, § 29.

What laws are, and shall be, in force, const. art. IV, § 19.

Judicial districts for Superior Courts, const. art. IV, § 10.

## Judicial powers.

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Jurisdiction of courts inferior to Supreme Court, const. art. IV, § 12.

## Jury.

Right of trial by jury, const. art. I, §§ 13, 19.

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Justices of the peace, const. art. IV, § 2.

Governor to appoint justices, const. art. VII, § 11.

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What laws are, and shall be, in force, const. art. IV, § 19.

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## Legislature.

See *infra*, "General Assembly."

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## Local acts.

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Militia, const. art. XII, §§ 1-4.

Exemptions, const. art. XII, § 4.

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Militia and the right to bear arms, const. art. I, § 24.

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Who are liable to militia duty, const. art. XII, § 1.

Miscegenation, const. art. XIV, § 8.

Miscellaneous provisions, const. art. XIV, §§ 1-8.

Monopolies, const. art. I, § 31.

Municipal corporations, const. art. VII, §§ 1-14.

See *infra*, "Counties."

Charters to remain in force until legally changed, const. art. VII, § 12.

Debts in aid of the rebellion not to be paid, const. art. VII, § 13.

General laws, const. art. VIII, § 4.

Legislature to provide for organizing cities, towns, etc., const. art. VIII, § 4.

Powers of General Assembly over municipal corporations, const. art. VII, § 14.

## Townships.

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## Officers.

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Orphan houses, const. art. XI, § 8.

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## CONSTITUTION OF NORTH CAROLINA—Continued.

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Private acts.

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Privileges, exclusive, const. art. I, §§ 7, 30.

Property qualification, const. art. I, § 22.

Public debt.

Bonds issued under ordinance of Convention of 1868-, '68-'69,  
'69-'70, declared invalid; exception, const. art. I, § 6.

Public officers.

Appointments, const. art. XIV, § 5.

Atheists, const. art. VI, § 8.

Convicts, const. art. VI, § 8.

County officers.

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Disqualification for office, const. art. VI, § 8.

Eligibility to office, const. art. VI, § 7.

Form of oath, const. art. VI, § 7.

Holding other office under United States, const. art. XIV, § 7.

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Judicial officers.

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Oath, const. art. VI, § 7.

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Enumeration of punishments, const. art. XI, § 1.

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Houses of correction, const. art. XI, § 4.

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Imprisonment, const. art. XI, § 1.

Penitentiary, const. art. XI, § 3.

The sexes to be separated, const. art. XI, § 6.

What convicts may be farmed out, const. art. XI, § 1.

Quartering soldiers, const. art. I, § 36.

Rebellion.

Debts in aid of the rebellion not to be paid, const. art. VIII,  
§ 13.

Religious liberty, const. art. I, § 26.

Remedy by due course of law, const. art. I, § 35.

Reports.

Annual reports from officers of executive department and of  
public institutions, const. art. III, § 7.

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## CONSTITUTION OF NORTH CAROLINA—Continued.

Repudiation of bonds, const. art. I, § 6.

Revenue.

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Right of the people to assemble together, const. art. I, § 25.

Right of trial by jury, const. art. I, §§ 13, 19.

See "Jury."

Rights of men, const. art. I, § 1.

Rights of the people.

Enumeration not to impair or deny other rights, const. art. I, § 37.

Right to bear arms, const. art. I, § 24.

Right to secede, const. art. I, § 4.

Sale of justice, const. art. I, § 35.

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General warrants, const. art. I, § 15.

Seat of government, const. art. XIV, § 6.

Secession, right of, const. art. I, § 4.

Secretary of state, const. art. III, §§ 1, 13.

Self incrimination, const. art. I, § 11.

Separation of departments.

The legislative, executive, and judicial powers distinct, const. art. I, § 8.

Sheriffs, const. art. IV, § 24.

Slavery, const. art. I, § 33.

Soldiers in time of peace, const. art. I, § 36.

Solicitor.

Solicitors for each judicial district, const. art. IV, § 23.

Special acts.

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Special judges, const. art. IV, § 11.

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Supersedeas and stay of proceedings.

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Acts levying taxes shall state object, etc., const. art. V, § 7.

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## CONSTITUTION OF NORTH CAROLINA--Continued.

## Taxation--Continued.

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Exemptions, const. art. V, §§ 3, 5.

Representation and taxation, const. art. I, § 23.

Restrictions upon the increase of the public debt except in certain contingencies, const. art. V, § 4.

Taxes levied for counties, const. art. V, § 6.

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## Terms of court.

Special terms, const. art. IV, § 11.

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## Townships, const. art. VII, §§ 3, 4.

Officers of townships, const. art. VII, § 5.

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## University of North Carolina.

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## Warrants.

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